

SINGLE APPENDIX

MICHAEL ROBAK

Supreme Court of the United States

October Term, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, ET AL, *Appellants*,

v.

BOB BULLOCK, Secretary of State of Texas, *Appellee*,

No. 72-942

ROBERT HAINSWORTH, *Appellant*,

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

**Appeal From The United States District Court
For The Western District of Texas**

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

No. 72-887—Docketed December 15, 1972

No. 72-942—Docketed December 30, 1972

Jurisdiction Noted March 5, 1973

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

CIVIL NO. MO-72-CA-50

THE AMERICAN PARTY OF TEXAS, et al,
Petitioners,

v.

HONORABLE BOB BULLOCK,
Secretary of State of Texas,
Defendant.

COMPLAINT

TO THE SAID HONORABLE COURT:

I.

Petitioners, THE AMERICAN PARTY OF TEXAS, is a political party organized in Texas; HOMER FIKES, of Stonewall, Gillespie County, Texas, announced candidate for Governor of the State of Texas, subject to nomination by State Convention of the members of THE AMERICAN PARTY OF TEXAS, and H. D. "HUB" HORTON, of Odessa, Ector County, Texas, announced candidate for Ector County Commissioner, Precinct 1; and ROBERT FRIAS, of Odessa, Ector County, Texas, qualified voter, bring this Complaint as a class action for Injunction and for Declaratory Judgment against the Honorable BOB BULLOCK, Secretary of State of the State of Texas, having his office in the Capitol Building, Austin, Texas, where he may be served with process of citation herein.

II.

This action arises under the Constitution of the United States, including the guarantee of freedom of political association of the First Amendment, the due process and equal protection clauses of the Fourteenth Amendments and the Fifteenth Amendment.

III.

This is a proceeding for Injunction and for Declaratory Judgment pursuant to 28 U.S.C. § 2201 and § 2202. This Court has jurisdiction of this action under 42 U.S.C. § 1971, et seq., 42 U.S.C. § 1983, 28 U.S.C. § 1343 (3)(4), and Rule 23 of the Federal Rules of Civil Procedure.

IV.

Petitioners bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all other members of their class who choose to participate as voters of THE AMERICAN PARTY OF TEXAS, or who choose to participate as voters of any other political party. This class consists of all those voters in the State of Texas who are prevented from voting for persons of their choice in County, District, State and Federal elections because of the statutory prohibition of Article 13.45 (2)* preventing by its onerous provisions the candidacy of those persons who choose to submit themselves for election on a platform other than that prescribed by the Republican and Democratic party conventions and which statute prevents

* Omitted in printing—Jurisdictional Statement—Appendix D, Pages 46-48.

the effective free vote by those persons who choose to vote for candidates other than those nominated by the Primaries of the Republican and Democrat parties, all in violation of the constitutional rights of Plaintiffs and their class as guaranteed by the First, Fourteenth and Fifteenth Amendments to the United States Constitution, the Civil Rights Act of 1871, and the 1965 Voting Rights Act.

As to the class, Plaintiffs, FIKES, HORTON and FRIAS, represent:

1. The class is so numerous that joinder of all its members is impractical.
2. There are questions of law and fact common to the class.
3. The claims of Plaintiffs, FIKES, HORTON and FRIAS, are typical of the claims of the class.
4. Plaintiffs, FIKES, HORTON and FRIAS, will fairly and adequately protect the interest of the class; and

The statutory requirements are generally applicable to the class, thereby making appropriate final relief with respect to the class.

V.

V.A.C.S. Art. 13.45 (2) of the Texas Election Code is unconstitutional in violation of the First, Fourteenth and Fifteenth Amendment of the Constitution of the United States of America in each of the following particulars:

1. It makes no provisions for voter participation by absentee voting in the nomination process.

2. It prevents voter participation by absentee voting for nomination.

3. It prevents voter participation by voting in the primary of a major party.

4. The limitation of the circulation of the Petition until after the date set for the general primary election is discriminatory as contrasted to the statutory provision for absentee voting more than 20 days prior to the primary election day.

5. It requires a prohibitive timing deadline for certification of participants in precinct conventions.

6. It requires a prohibitive timing deadline for the circulation and execution of the Petition for nomination.

7. It limits effective participation to a majority organized party by unreasonably, capriciously and arbitrarily restricting the rights of the voters in the election process.

8. It is not to promote a compelling state interest.

9. It conflicts with the intent of the legislature that the will of the people shall prevail and that true democracy shall not perish in the Lone Star State.

10. It has as its sole purpose the restriction of voters' participation in the election process.

11. The requirement of the certificate of the officer administering the oath is unnecessarily burdensome in addition to the normal requirements of voter participation.

12. The wording of the oath excluding participation in primary voting is unnecessarily burdensome and in addition to the standard requirements for participation in a party primary election.

13. The requirement that the Petition requesting the names of the parties nominees to be printed on the general election ballot be submitted within 20 days after the date for holding the parties State Convention has no public purpose and is arbitrarily and unreasonably prejudicial to the nomination of candidates for position on the November general election ballot.

14. The deadline for the nominating petition is arbitrary, capricious and unreasonable being more than 90 days prior to the statutory date of certification of the nominees for the printing of the general election ballot.

15. The limitation of the signers of the Petition to those persons who have not voted in a party primary election or participated in a convention of any other party deprives those persons who signed the Petition of equal protection of the law in that they are prevented from participating in the nomination process and are deprived of full participation in the election process as prescribed by the United States Constitution.

16. The wording is too vague, indefinite and uncertain which prohibits compliance.

17. It is invidiously discriminatory as to any minority party.

18. The arbitrary, capricious and unreasonable requirements for ballot position imposes invidiously discriminatory qualifications for nominations.

VI.

The intentional discrimination practiced by the Texas Legislature controlled by the majority Democratic party in the State of Texas, enacting prohibitive restrictions

against a minority party as enacted in V.A.C.S., Art. 13.45 (2) is repeatedly demonstrated by the enactment of the McKool-Stroud Primary Financing Law of 1972, 62nd Legislature—2nd Called Session—S.B. No. 1,* which is unconstitutional in each of the following particulars:

1. The law specifically includes only V.A.C.S., art. 13.02, 13.03, Texas Election Code, which is discriminatory against all other statutory nomination processes.

2. It prohibits participation by the minority party nominating by convention as further limited by V.A.C.S. art. 13.45 (2).

3. It is violative of the due process and equal protection of the law provisions of the Fourteenth Amendment to the United States Constitution.

4. It is discriminatory on its face in that it limits participation to political parties casting 200,000 or more votes at the next preceding gubernatorial election.

5. The appropriation by the Texas Legislature of tax receipts by virtue of levy on real and personal property located in the State of Texas, is discriminatory against the rights of all persons and citizens who are not members of the political party known as the Democratic party and Republican party of the State of Texas.

6. The appropriation of public tax money to effect the nomination of candidates for certain political parties as opposed to the costly nomination by the statutory requirement of excessive expenditures by other party organiza-

* Omitted in printing—Jurisdictional Statement—Appendix D, Pages 51-57.

tions to nominate its candidate is obviously discriminatory and a denial of equal protection of the law.

7. It purports to authorize Defendants under color of law to create and maintain a monopoly for the benefit of the Democratic and the Republican party in the State of Texas, and to exclude other political parties by reason of financing and as such constitutes a denial of equal protection and due process.

8. It purports to appropriate public tax funds for the benefit of the Democratic and the Republican political parties only, specifically excluding participants under V.A.C.S. art. 13.45.(2).

9. The tax-funds financing of the major political party primaries to the exclusion of the nomination of candidates by minority parties is discriminatory in violation of the Fourteenth Amendment of the United States Constitution.

10. The financing of majority party primaries only is not public purpose.

11. It is unconstitutional in that the power of the Legislature to establish minimum requirements for holding primary elections does not empower the Legislature to use public funds to meet the established minimum requirements.

12. It is too indefinite, uncertain and vague to be capable of enforcement and consequently is invidiously discriminatory on its face in that the requirement of the party loyalty pledge confirming the creed of the voters to participate in the major party primary elections is discrimination based on age, sex, creed or national origin.

13. It is too indefinite, uncertain and vague as an authorization for the expenditure of tax money in that

the County Chairman of the participating major political party is the sole judge of the "amount actually spent in holding the party elections for the year".

14. It discriminates among the counties of the State of Texas based solely upon the certification of costs without limitation or corroboration as to the number of participating voters as compared to resident eligible voters and without limitation as to State provided facilities for primary voting and without valid corroboration of the purposes for the expenditure.

15. It is violative of the V.A.T.S. art. 13.45 and 13.45(a) which provide for nominations by conventions and/or primary elections by parties casting under 200,000 votes for the gubernatorial candidate at the next preceding general election.

16. The appropriation of public funds for the holding of particular party primaries as contrasted to the appropriation for public funds for the nomination of candidates by all political parties in accordance with statutory requirements effectively destroys the constitutionality of this appropriation of public funds as a public purpose.

17. It is unconstitutional in that it is a perfect example of profligacy.

VII.

Petitioners urge the Court to enjoin the Secretary of State from enforcing the June, 1972, deadline for the submission of sworn petitions for nomination.

VIII.

Petitioners must have their legal rights determined be-

fore the time to print the ballots for the general election as required by statute. That Petitioners have no plain, speedy or adequate remedy at law by appeal or otherwise and the constitutionality of the matters of law and the fact questions to be determined are of the greatest public purpose.

IX.

Petitioners would further show that the party candidates nominated by THE AMERICAN PARTY OF TEXAS are not ineligible to hold public office in the State of Texas, and to prevent them from having their names placed on the Official General Election Ballot in November, 1972, elections is to deprive them of basic constitutional rights in violation of the First, Fourteenth and Fifteenth Amendments to the United States Constitution.

To deny THE AMERICAN PARTY OF TEXAS candidates a place on their general election ballot in November, 1972, would be to deprive citizens desiring to vote for said candidate the right to cast a meaningful and effective vote for the candidate of their choice and to deprive them of a fundamental right guaranteed by the United States Constitution.

X.

Petitioners on information and belief allege that the requirements of the numbers of names by precinct convention and/or Petition, the limitation of the signers of the Petition to persons who have not voted in either the Republican or Democrat primary, the limitations of time to the circulation of such Petition to an arbitrary and unreasonable date expiring in June, 1972, more than

three (3) months prior to the statutory date for the printing of general election ballots, the imposition of the cost of the petitions on the candidates for nomination as contrasted to the appropriation of public funds for payment of the nomination of candidates in the two major political parties, in each and every instance deprive Petitioners of substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution.

XI.

Petitioners further allege that the arbitrary, capricious, unreasonable, and prohibitive restrictions of Article 13.45(2) of the Texas Election Code directed to each and every political party not casting 200,000 votes for the gubernatorial candidate at the next preceding general election while conversely providing for the nomination of candidates by the Republican and Democrat party by the appropriation of unlimited and excessive tax money denied Petitioners equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

XII.

Petitioners further allege that Defendants have disenfranchised Petitioners and their class by denying them the right to vote for the candidate of their choice in violation of the 1965 Voting Rights Act, 42 U.S.C. § 1971 (a)(2) (A)(B).

XIII.

Unless this Court issues a temporary restraining order prohibiting the Secretary of State of the State of Texas

from invoking V.A.C.S. art. 13.45(2) of the Texas Election Code, Petitioners will suffer irreparable harm in that they and all other members of their class shall be excluded from their participation in the electoral process on the County, District, State and National levels in the general election, including the right to participate in the election of the President of the United States.

WHEREFORE Petitioners respectfully pray that this Honorable Court:

1. Enter its Order finding jurisdiction in this Court as herein alleged.

2. Issue a temporary restraining order prohibiting the Secretary of State of the State of Texas from invoking V.A.C.S. art. 13.45(2) of the Texas Election Code.

3. Invoke a three judge Federal Court to test the constitutionality of V.A.C.S. art. 13.45(2) and the McKool-Stroud Primary Financing Law of 1972.

4. Declare V.A.C.S. art. 13.45(2) of the Texas Election Code to be unconstitutional in its entirety.

5. Declare that V.A.C.S. art. 13.45(2) is unconstitutional in each of the following particulars:

- a. The requirement of the number of names signing the Petition.

- b. The requirement that the names be signed under oath.

- c. The limitation that the person signing the Petition shall not have voted in any primary election or participated in any convention held by any other political party.

d. That the Petition may not be circulated for signatures until after the date set for the general primary election.

e. That the date of the filing of the list of participants in precinct convention and petition requesting names of the parties' nominees be printed on the general election ballot within 20 days after the date for holding the party state convention.

6. Declare the McKool-Stroud Primary Financing Law of 1972, is unconstitutional in its entirety.

7. Enjoin the exclusion of the nominees of THE AMERICAN PARTY OF TEXAS State Convention from the general election ballot.

8. For such other and further relief to which Plaintiffs may be entitled under law and in equity and for which they shall ever pray.

/s/ GLORIA T. SVANAS
Gloria T. Svanas
Attorney for Petitioners

(JURAT OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

(TITLE OMITTED IN PRINTING)

DEFENDANT'S ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Bob Bullock, Secretary of State of Texas, Defendant in the above styled and numbered cause, represented herein by Crawford C. Martin, Attorney General of Texas, and in reply to Plaintiffs' Complaint files this his answer, and would respectfully show the Court as follows:

I.

Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted.

II.

Plaintiffs' Complaint fails to state a substantial federal question.

III.

A. The Defendant denies the allegations contained in Paragraphs II, III, V, VI, VII, VIII, X, XI, XII, and XIII of Plaintiffs' Complaint.

B. The Defendant, Bob Bullock, admits that he is Secretary of State of the State of Texas and has his office in the Capitol Building, Austin, Texas, but as to the remaining provisions of Paragraph I of Plaintiffs' Complaint, the Defendant is without sufficient knowledge or information to either admit or deny the same, and therefore the same should be considered as denied.

C. The Defendant denies the allegations contained in the second sentence of the first paragraph of Paragraph IV of Plaintiffs' Complaint, and as to the remaining allegations contained in Paragraph IV of Plaintiffs Complaint, the Defendant has neither knowledge nor information sufficient to either admit or deny said allegations and therefore the same should be taken as denied.

D. The Defendant does not possess knowledge or information sufficient to admit or deny the allegation contained in Paragraph IX that ". . . the party candidates nominated by the American Party of Texas are not ineligible to hold public office in the State of Texas . . .", and therefore the same should be considered as denied, but as to the remaining allegations contained in Paragraph IX of Plaintiffs' Complaint, the Defendant denies.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the relief sought by the Plaintiffs be in all things denied.

CRAWFORD C. MARTIN
Attorney General of Texas

PAT BAILEY
Pat Bailey
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711
Attorney For Defendant
Bob Bullock

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

CIVIL NO. MO-72-CA-50

(TITLE OMITTED IN PRINTING)

TEMPORARY RESTRAINING ORDER

On this the 14th day of June, 1972, came on to be considered Petitioners' Complaint and demand for temporary restraining order; came the Petitioner, THE AMERICAN PARTY OF TEXAS, by its State Chairman, H. D. "Hub" Horton, and the Petitioners, H. D. "Hub" Horton, Robert Frias and Homer Fikes, in person and by their attorney of record, Gloria T. Svanas, and came the Defendant, ROBERT BULLOCK, Secretary of State of Texas, by Pat Bailey, Assistant Attorney General of Texas; and the Court having considered the pleadings and having heard the argument of counsel is of the opinion that Petitioners should be granted a Temporary Restraining Order against the Defendant restraining the Defendant from refusing to accept petitions of Petitioners to be obtained and filed by Petitioners pursuant to Article 13.45 (2) between June 30, 1972, and September 1, 1972;

It is therefore ORDERED, ADJUDGED and DECREED that Defendant, BOB BULLOCK, Secretary of Texas be and he hereby is temporarily restrained from refusing to accept and file nominating petitions pursuant to Art. 13.45 (2) obtained by Petitioners between June 30, 1972, and September 1, 1972.

It is further ORDERED, ADJUDGED and DECREED

that the Petitioners are not relieved from any further duties, responsibilities or requirements otherwise required by the Texas Election Code or Article 13.45 thereof except as hereabove ordered.

It is further ORDERED, ADJUDGED and DECREED that those petitions obtained and filed by the Petitioners between June 30, 1972 and September 1, 1972, shall only be considered valid for the purpose of complying with Article 13.45 of the Texas Election Code in the event the Petitioners prevail upon the merits in this proceeding.

To all of which Defendant duly excepted in open Court.

D. W. SUTTLE

United States District Judge

APPROVED AS TO FORM:

GLORIA T. SVANAS

Gloria T. Svanas

Attorney for Petitioners

PAT BAILEY

Pat Bailey

Attorney for Defendant

(Seal)

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: **SHIRLEY JONES, Deputy.**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

CIVIL NO. MO-72-CA-50

(TITLE OMITTED IN PRINTING)

MOTION FOR ANCILLARY RELIEF
TO SAID HONORABLE COURT:

NOW COME, Petitioners, THE AMERICAN PARTY OF TEXAS, H. D. "Hub" Horton, Robert Frias, and Homer Fikes, and make this Motion for Ancillary Relief in the form of a Temporary Restraining Order and Permanent Injunction against the Defendant, BOB BULLOCK, Secretary of State of Texas, and in support of such Motion would respectfully show to the Court as follows:

I.

Petitioners would show to the Court that the Defendant, BOB BULLOCK, Secretary of State of Texas, is seeking additional appropriations from the Legislature of the State of Texas, to pay commitments under color of law of the McKool-Stroud Primary Financing Law of 1972, 62nd Legislature, 2nd Called Session—Senate Bill No. 1 (attached to Plaintiffs' Original Complaint as Exhibit "B").*

* Omitted in printing—Jurisdictional Statement—Appendix, Pages 51-57.

II.

Petitioners would further show to the Court that they in their capacities as candidates and as taxpayers of the State of Texas will suffer immediate and irreparable harm if payments are made pursuant to the McKool-Stroud Primary Law of 1972, to the County Chairmen of the Democratic and Republican parties. (TOOMER V. WITSELL, 334 U.S. 385, 92 L. Ed. 1460, 68th S. Ct. 1156, Reh. Den.) Petitioners would further show that the payment of monies by the Defendant to the County Chairman of the Democratic and Republican parties in the State of Texas would result in great and irremediable injury to personal rights of Petitioners which injury is real and imminent in that the Texas Legislature is now sitting in Special Session and that the appropriation made under color of law of the McKool-Stroud Primary Financing Law of 1972 is insufficient to meet the cost of the party primary held by the Democratic and Republican parties and that the Defendant has requested additional funds from the Special Session of the Texas Legislature. Petitioners would further urge the Court that there is no adequate remedy at law in that the monies to be spent by the Defendant, BOB BULLOCK, under color of the McKool-Stroud Primary Financing Law of 1972, are extraordinary and excessive expenditures by the Defendant and are not recoverable by Petitioners from the payees if the Defendant should not be restrained from making such payments under color of the McKool-Stroud Primary Financing Law of 1972.

III.

Petitioners would further urge the Court that Petitioners Complaint heretofore filed herein alleges that the McKool-

Stroud Primary Financing Law of 1972 is unconstitutional and that Defendant should be restrained from making any payments under color of such law until the constitutionality of such law and the legality of such payments have been determined by this Honorable Court sitting as a three-Judge District Court.

WHEREFORE, Petitioners pray that after due notice to the Defendant that this Motion be set for hearing by this Honorable Court at the earliest possible hour and that this Honorable Court issue a Temporary Restraining Order prohibiting the Defendant, BOB BULLOCK, Secretary of State of Texas, from making any payments, disbursements or authorizations pursuant to the McKool-Stroud Primary Financing Law of 1972, pending hearing on the merits before the three-Judge Federal District Court testing the constitutionality of the McKool-Stroud Primary Financing Law of 1972; and further, upon the determination on the merits that the McKool-Stroud Primary Financing Law of 1972, is unconstitutional and void, that such Temporary Restraining Order be made a permanent injunction; and for such other and further relief to which Petitioners may be entitled and for which they shall ever pray.

GLORIA T. SVANAS
Gloria T. Svanas
Attorney for Petitioners

(JURAT OMITTED IN PRINTING)

(CERTIFICATE OF SERVICE OMITTED
IN PRINTING)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

(TITLE OMITTED IN PRINTING)

ORDER DENYING MOTION FOR
ANCILLARY RELIEF

On this the 16th day of June, 1972, came before the Court petitioners' Motion for Ancillary Relief, filed herein on this date, wherein petitioners pray that the Court "issue a Temporary Restraining Order prohibiting the defendant, Bob Bullock, Secretary of State of Texas, from making any payments, disbursements or authorizations pursuant to the McKool-Stroud Primary Financing Law of 1972, pending hearing on the merits before the three-Judge Federal District Court testing the constitutionality of the McKool-Stroud Primary Financing Law of 1972; and further, upon the determination on the merits that the McKool-Stroud Primary Financing Law of 1972, is unconstitutional and void, that such Temporary Restraining Order be made a permanent injunction; and for such other and further relief to which petitioners may be entitled."

The Court, having duly considered the same and the relief heretofore granted petitioners, finds that the Motion for Ancillary Relief should be DENIED.

IT IS, ACCORDINGLY, SO ORDERED.

Entered this 16th day of June, 1972.

D. W. SUTTLE
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

(TITLE OMITTED IN PRINTING)

MOTION FOR HEARING

TO THE HONORABLE JUDGE THORNBERRY,
JUDGE SUTTLE and JUDGE WOOD:

NOW COME the Petitioners and in support of their
Motion for Hearing would respectfully show the Court:

I.

On May 31, 1972, Petitioners filed their Application herein for Injunction and to test the unconstitutionality of two (2) Texas State statutes, specifically, Election Code art. 13.45 (2) V.A.T.S., and the McKool-Stroud Primary Financing Law of 1972. On June 19, 1972, The designation and composition of the three-judge district Court was named.

II.

Petitioners in their Complaint and supported by their Memorandum of Authority filed herein on June 7, 1972, urge this Honorable Court for immediate relief from the unreasonable and capricious requirements for ballot position under Election Code art. 13.45 (2) and would further show this Court that such requirements become arbitrarily exclusive by such state statute on June 30, 1972.

III.

Petitioners further urge the Court that unless Bob Bullock is enjoined by this Court from disbursements under the unconstitutional state statute entitled McKool-Stroud Primary Financing Law of 1972, Petitioners and all members of their class will suffer irreparable and immediate harm against their property rights.

IV.

Petitioners as nominees and voters of The American Party of Texas are necessarily spending thousands of dollars daily in their continuing efforts to attempt to comply and fulfill the unreasonable and unconstitutional requirements for ballot position as required by Election Code art. 13.45 (2) V.A.T.S. and that unless an injunction be immediately issued by this Court that Petitioners will suffer continuing and irreparable losses of time and money by reason of such unconstitutional requirements.

V.

Petitioners respectfully urge this Court to give the Application of Petitioners precedence and that such Application be assigned for hearing before said Honorable Court on Friday, June 30, 1972, at 10:00 A.M. at the U. S. District Court, 211 North Colorado St., Midland, Texas, as the earliest practicable day (28 U.S.C.A. 2284 (4)) subject to five (5) days notice to the Governor and Attorney General of the State of Texas. (28 U.S.C.A. 2284 (2)).

WHEREFORE, Petitioners pray that such Order for Hearing be issued and that upon such Hearing such statutes, namely, Election Code 13.45 (2) V.A.T.S. and the

McKool Stroud Primary Financing Law of 1972 be each held to be unconstitutional in its entirety and that permanent injunction issue; and for such other and further relief to which Petitioners shall be entitled.

GLORIA T. SYANAS
Gloria T. Syanas
Attorney for Petitioners

(CERTIFICATE OF SERVICE OMITTED IN
PRINTING)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

(TITLE OMITTED IN PRINTING)

ORDER DENYING MOTION FOR HEARING

On this the 26th day of June, 1972, came to the attention of the Court petitioner's motion for injunction hearing on Friday, June 30, 1972, at 10:00 a.m., at the United States District Court, 211 North Colorado, Midland, Texas, and the Court, after a long-distance conference telephone call with Circuit Judge Homer Thornberry, United States District Judges Jack Roberts, John H. Wood, Jr., and D. W. Suttle participating, finds that conflicting appointments prevent the Court from granting the hearing requested; further, that there are a number of other cases pending in the State of Texas involving the same issues as presented in this case and that consolidation of the several suits is indicated; that such fact will be made known to Honorable John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit, for an order authorizing consolidation of such cases so that one trial for all the cases may be scheduled, including dates for submission of trial briefs and also for a trial date on the merits that can be met by the judges assigned to hear the consolidated cases in the interest of judicial economy and an efficient disposition of the issues on the merits.

All requests of the petitioner for immediate relief by nature of temporary restraining order or temporary injunction is consequently DENIED.

The consolidated cases will be set down for trial on the merits at the earliest practicable date as indicated.

IT IS, ACCORDINGLY, SO ORDERED.

Entered this 26th day of June, 1972.

D. W. SUTTLE
United States District Judge

A true copy of the original, I certify.
DAN W. BENEDICT, Clerk

By: SHIRLEY JONES, Deputy.

(Seal)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

C. A. No. 72-H-990

TEXAS NEW PARTY, ET AL, Plaintiffs,
v.
PRESTON SMITH, Governor, and BOB BULLOCK,
Secretary of State, Defendants.

- (1) District Judge: Honorable D. W. Suttle
Western District of Texas
- (2) District Judge: Honorable John H. Wood, Jr.
Western District of Texas
- (3) Circuit Judge: Honorable Homer Thornberry
- (4) Date of Order: July 28, 1972

All Judges having consented, the application of the Honorable Allen B. Hannay, the requesting Judge, for designation of a three-judge court, is to be consolidated for submission and hearing with the following cases now pending in the United States District Court for the Western District of Texas:

No. W-72-CA-37 - Dunn, et al v. Bullock
No. MO-72-CA-50 - American Party of Texas, et al
v. Bob Bullock
No. SA-72-CA-158 - Raza Unida Party, et al v. Bob
Bullock

As Chief Judge of the Fifth Circuit, I hereby designate Honorable D. W. Suttle and Honorable John H. Wood, Jr., United States District Judges of the Western District of Texas and Homer Thornberry, United States Circuit Judge, as members of and to constitute the Court to herein determine the action. Whether separate or consolidated decrees are to be entered will be left to the determination of the three-judge court.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This matter is best determined by the three-judge court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-judge panel either preliminarily or on the trial of the merits or otherwise as that Court thinks appropriate.

/s/ JOHN R. BROWN
John R. Brown
Chief Judge
Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(TITLE OMITTED IN PRINTING)

STIPULATIONS OF FACT

TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW the Plaintiffs and the Defendants in Cause No. MO-72-CA-50, American Party of Texas, et al. v. Bob Bullock, and through their respective attorneys of record, stipulate to the following facts for the purpose of this litigation, and agree that the same may be introduced and used as evidence herein.

1. That all of the factual allegations contained in Paragraph I of the American Party of Texas Complaint are true and correct.
2. The number of the registered members of the American Party of Texas in 1968 was 91,958.
3. The number of votes cast in Texas in 1968 for the presidential nominee of the American Party of Texas was 584,269.
4. That on September 1, 1971, the American Party of Texas filed with the Secretary of State its declaration of intention to nominate candidates by convention.
5. That on February 22, 1972, the Executive Committee of the American Party of Texas certified to the Secretary of State the names of persons who had filed with the party on or before February 7, 1972, to be candidates for the party's nominations.

6. That on March 24, 1972, the party rules of the American Party of Texas were filed with the Secretary of State.

7. That on June 29, 1972, the American Party of Texas filed with the Secretary of State the minutes of its state convention and the names of the nominees selected by the party.

8. That on June 29, 1972, the American Party of Texas filed with the Secretary of State the lists of qualified voters who participated in the party's precinct conventions, a total of 2,732, and along with the above lists filed petitions signed by 5,096 qualified voters, who urged that the party's nominees be placed on the ballot for the general election.

9. That the attached Xerox copies of vote tabulations for the Republican Party primaries as of May 6, 1972, are true and correct.

10. That the Democratic Party held a party primary in each and every county of Texas.

11. That the attached Xerox copies of press releases by Bob Bullock, Secretary of State, of June 29, 1972 and August 2, 1972, represent computations made by the office of the Secretary of State.

12. That on August 31, 1972, the State Chairman of the American Party certified the filing of 17,678 names

to the Secretary of State urging the nominees of the American Party to be placed on the general election ballot.

GLORIA T. SVANAS

Gloria T. Svanas

Attorney for Plaintiff

CRAWFORD C. MARTIN

Attorney General of Texas

PAT BAILEY

Pat Bailey

Assistant Attorney General

P. O. Box 12548

Capitol Station

Austin, Texas 78711

Attorneys For Defendant

(Certificate Of Service Omitted In Printing)

NO. 72-942

ROBERT HAINSWORTH, Appellant

v.

MARK WHITE, JR., SECRETARY OF STATE
OF TEXAS, Appellee

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

NO. A 72 CA 111

RELEVANT DOCKET ENTRIES

8-23-72 1. Original Petition Filed.

9-7-72 5. 3-Judge Hearing on Petitions attacking constitutionality of the election code of the State of Texas.
* * Arguments of counsel heard and completed. Pltff Hainsworth to file brief by Monday, September 11, 1972, and to mail a copy to Sec. of State. Case taken under advisement.

9-11-72 6. Brief of Petitioner filed (copies to 3 Judges)

9-14-72 7. Defts Motion to Dismiss, filed (copies 3 Judges)

9-21-72 9. Memorandum and Order filed denying relief sought by Plaintiff and granting Defendant's Motion (for Summary Judgment) filed.

9-29-72 11. Motion for Rehearing, filed (copy to 3 Judges).

9-29-72 12. Brief in Support of Motion for Rehearing filed, Copy to 3 Judges.

9-29-72 13. Notice of Motion of Defendant, filed. Copy to three Judges.

10-3-72 15. Order Denying Motion for Rehearing filed (3-Judge—Thornberry, Suttle, Wood) (Copies mailed to Plaintiff, 3 Judges & Attorney General by San Antonio Clerk's office)

10-4-72 16. Respondents' Opposition to Motion for Rehearing, filed.

11-2-72 20. Notice of Appeal to the Supreme Court of the United States filed.

RELEVANT PLEADINGS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AT AUSTIN

CIVIL ACTION NO. A 72 CA 111

ROBERT HAINSWORTH,
Petitioner

v.

BOB BULLOCK, SECRETARY OF STATE,
STATE OF TEXAS,
Respondent

PETITION FOR PRELIMINARY INJUNCTION

TO SAID HONORABLE COURT:

Petitioner in his behalf and on behalf of others similarly situated, states in his petition for injunctive relief, as follows:

I.

Jurisdiction is conferred on this Court by 28 USC Section 1343 (3).

II.

Petitioner is a native citizen of the United States and of the State of Texas, and is a resident and citizen of Harris County, Texas.

Respondent is the Honorable Bob Bullock, Secretary of State of the State of Texas, with his office and official residence being at the seat of government, the State Capitol, in Austin, Travis County, and he may be served a copy of this Petition for Preliminary Injunction by serving him at his office of Secretary of State in the State Capitol Building, in Austin, Travis County, Texas.

That the Honorable Crawford Martin is the Attorney General of the State of Texas, with his office being in the Supreme Court Building in Austin, Texas, and he may be served a copy of the Petition For Preliminary Injunction, for his knowledge, as he is the Attorney General of the State of Texas.

III.

Challenge is made to the constitutionality of Art. 1350, Election Code, V.A.T.S., which provides in part as follows:

"The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

If for an office to be voted for throughout the State, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of more than one county, the application shall be signed by three

per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

* * * * *

Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county or precinct office need not exceed five hundred.

* * * * *"

Particular challenge is made to the constitutionality of the provision above quoted, which requires that if for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election; but the number of signatures required on an application for any district office need not exceed five hundred.

IV.

That the petitioner filed his application to have his name placed on the official ballot for the general election to be held on November 7, 1972, together with his Affidavit of Intent to run as an Independent Candidate for the office of State Representative, District 86, in accordance with Art. 13.47a, Section 3.

That the petition to get the name of Robert Hainsworth on the ballot as an independent candidate was begun to

be circulated on June 5, 1972, and within thirty days after the second primary election day, on July 3, 1972, petitioner brought such application to get the name of Robert Hainsworth on the ballot as an independent candidate for the general election, 1972, to the office of the Secretary of State.

The petitioner did not have five hundred signatures to such application, nor five per cent of the entire vote cast for Governor in such district at the last preceding general election, but did have over three hundred signatures, Three Hundred Twenty-Two signatures by the count of the petitioner. As over three hundred qualified voters had signed the application to get the name of Robert Hainsworth on the ballot for the general election on November 7, 1972, then, if his name was on such ballot, each of the signers of the application, as well as other qualified voters would have the opportunity to vote for him in the general election in November.

Petitioner presented a written request for an extension of time in which to obtain signatures to application, to the office of the Secretary of State, a copy of which is attached hereto, as Exhibit "A".

Petitioner was advised that the Secretary of State could not extend the time, and that the only way that an extension could be secured was by petition to the Court and the obtaining of a Court Order.

Afterwards, on July 3, 1972, petitioner left for filing the application to get the name of Robert Hainsworth on the ballot as an Independent Candidate together with his Consent To Become a Candidate in the office of the Secretary of State.

Petitioner meets all qualifications to be an Independent Candidate for State Representative, District 86, except that he did not have signatures of qualified voters to his application numbering five per cent of the entire vote cast for Governor in such district at the last preceding general election, nor five hundred signatures to his application.

That petitioner had on prior occasions endeavored to get his name on the ballot as an independent candidate, but did not obtain enough signatures to his application, on prior occasions.

V.

Art. 13.07a, and Art. 13.08c, V.A.T.S. Election Code, were declared unconstitutional by Federal Court.

Art. 13.07A(3) provided in part: "If a candidate is unable to pay the deposit or filing fee as required * * * in lieu of payment he may file with his application a petition of voters, * * * and he shall not then be required to pay any deposit, fee or assessment as a condition for having his name printed on the ballot for either the primary election or the general election; * * *."

That some of the provisions of Art. 13.08c that were declared unconstitutional were more favorable to political party candidates than provisions of Art. 13.50 were to independent candidates, as for example, under Art. 13.08c:

A. Such petition could be circulated for 90 days preceding the deadline for filing;

B. There was no restriction to the number or class of voters that were eligible to sign the application of a

candidate of a political party. All of the registered voters of the territory were initially eligible to sign the application, and open to such candidate to obtain signatures;

C. The number of signatures of qualified voters required was 10 per cent of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory (state, district, county or precinct, as the case may be) in which the candidate was running.

That some of the provisions of Art. 13.50, referred to above, applicable to independent candidates, are, as for example:

(A) Only 30 days are allowed to canvass for the required number of signatures to application of independent candidate;

(B) The number of eligible voters to sign the application of an independent candidate is restricted to those voters who did not participate in the general primary election or the runoff primary election of any party who had nominated, at either such election a candidate for the office for which the independent candidate is trying to become a candidate;

(C) The number of signatures required is five per cent of the entire vote cast for Governor in such district at the last preceding general election. Notwithstanding the foregoing provision, the number of signatures required for an application for any district, county or precinct office need not exceed five hundred.

It is alleged that because of the difference in the above provisions of the Articles of the Election Code of Texas that the equal protection of the laws under Section I,

of Amendment XIV, to the Constitution of the United States was not afforded to one who tried to become an independent candidate under the Election Code of Texas, as compared with one who tried to become a candidate by getting his name on the ballot of a political party by petition.

VI.

That by virtue of the following cases: Van Phillip Carter et al, v. Martin Dies et al, 321 F. Supp. 1358; Johnston et al, v. Bullock et al, 338 F. Supp. 355; and Bob Bullock et al, v. Van Phillip Carter et al, 31 L.Ed.2d 92, 92 S.Ct. ____; certain provisions of the Texas Election Code have been declared invalid and unconstitutional.

Further, it is alleged that as a result of one or more of the above cited cases that the Secretary of State of the State of Texas promulgated a schedule of primary filing fees or an alternative nominating petition, and that some of such are:

FILING FEES

Statewide Office	Reduced from - \$1,000.00	to	\$400.00
State Senator	Reduced from - 1,000.00	to	150.00
State Representative	Reduced from - 600.00	to	100.00
	Maximum		

NOMINATING PETITIONS

Statewide Office	Reduced from ten per cent of the entire vote of the State cast for that party's candidate for governor in the last preceding general election.	to	2,500 signatures
District, County, or Precinct Office	Reduced from at least ten per cent of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory, (district, county or precinct, as the case may be) in which the candidate is running.	to	2% of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory. In no event shall the number of signatures that are required be less than twenty-five (25) nor more than three hundred (300).

Approximately, 30 days granted to obtain signatures to nominating petitions, and submit to appropriate officer.

VII.

Although the above is a sample of the alleged schedule of filing fees and of alternative nominating petitions for

candidates, as promulgated by the Secretary of State, there has been apparently no relaxing of the Texas Election Code provisions, or promulgation by the Secretary of State of alternative nominating petitions with respect to independent candidates.

It is respectfully submitted that the promulgation of a fairer and smaller schedule of filing fees, and of alternative nominating petitions with respect to political party candidates, as set out above; while at the same time, not making any change in Article 13.50 of the Texas Election Code pertaining to independent candidates; makes for inequality of the laws in the State of Texas with respect to a candidate who seeks to get his name on the primary ballot of a political party by the nominating petition, and an independent candidate who seeks to get his name on the general election ballot by the nominating petition.

Instead of an independent candidate being required, only, to obtain signatures in number equal to 2% of the entire vote cast for any party's candidate for governor in the last preceding general election in the territory or district in which the independent candidate is trying to become a candidate, and not to exceed three hundred (300) in number, the independent candidate is still required to obtain 5% of the entire vote cast for governor in the last preceding general election in the territory, (district, county or precinct, as the case may be); but not to exceed five hundred (500) in number.

The provisions of the Election Code of Texas, Art. 13.50, V.A.T.S., as pertains to independent candidates are such that one who seeks to become an independent candidate and have his name placed on the general election ballot for November 7, 1972, as an independent candi-

date, is so disadvantaged and so discriminated against by the provisions of the Texas Election Code. Art. 13.50, V.A.T.S., that the independent candidate is denied the equal protection of the laws under Section I, of Amendment XIV, to the Constitution of the United States.

VIII.

Petitioner has no adequate remedy at law.

IX.

That unless the Secretary of State shall issue his instruction to the proper officer directing that the name of the petitioner shall be printed on the official ballot for the general election on November 7, 1972, in the independent column under the title of the office for which the petitioner is a candidate, the petitioner, as well as voters interested in casting their vote for the petitioner in the general election, will suffer irreparable damage.

Wherefore, petitioner prays for a preliminary injunction, and that:

1. The Court enjoin, suspend or restrain the enforcement of Art. 13.50 of the Texas Election Code, V.A.T.S., and in particular that provision which provides therein that in order for the name of a nonpartisan or independent candidate for a district office in a district composed of only one county or part of one county, to be printed on the official ballot in the column for independent candidates, the application shall be signed by five per cent of the entire vote cast for governor in such district at the last preceding general election, but not to exceed five hundred in number;

2. The Court enjoin and restrain the enforcement by the Secretary of State of any requirement of the Texas Election Code calling for a greater number of signatures

to a nominating petition of an independent candidate than that required of signatures to an alternative nominating petition of a political party candidate, as promulgated by the Secretary of State in 1972, for the primary elections in 1972, which alternative nominating petition requirements are set out in Paragraph VI, above;

3. The Court require the Secretary of State to issue instructions to the proper officer that the name of any independent candidate who has signatures to nominating petition, equal in per cent, or number, to those required on an alternative nominating petition of a political party candidate, as promulgated by the Secretary of State in 1972, be printed on the official ballot for the general election on November 7, 1972, in the column for independent candidates.

And petitioner further prays that jurisdiction be taken by a Three-Judge Court pursuant to 28 U.S.C.A. Sec. 2281 and 28 U.S.C.A. Sec. 2284.

And further that on hearing of this petition and application for a preliminary injunction, that the injunctive relief sought, be granted, and that a preliminary injunction be issued until final hearing can be had in the above matter; and that on final hearing said preliminary injunction be made permanent; and that the Court will grant such other and further relief, as to the Court may seem just in the premises, and costs of court.

Respectfully submitted,

/s/ ROBERT W. HAINSWORTH
Attorney for Petitioner
Alvin Building
3710 Holman Avenue
Houston, Texas 77004
Telephone 748-4922.

VERIFICATION

The State of Texas,)
)
 County of Harris.)

Robert Hainsworth, being first duly sworn, on his oath states that he is the petitioner in the above and foregoing Petition For Preliminary Injunction, and that he has read the foregoing Petition For Preliminary Injunction, and knows the contents thereof, and that the facts stated therein are true to his own knowledge, except as to matters therein alleged which are based on information and belief, and as to those such matters he believes them to be true.

/s/ **ROBERT W. HAINSWORTH**
 Robert Hainsworth.

Subscribed and sworn to before me this 23rd day of August, 1972.

H. G. CUNEY
 Notary Public in and for Harris
 County, Texas.

My commission expires on the
 1st day of June, 1973.

EXHIBIT "A"

July 3, 1972

**REQUEST FOR EXTENSION OF TIME
TO FILE APPLICATION TO GET NAME
OF INDEPENDENT CANDIDATE ON BALLOT
TO THE SECRETARY OF STATE,
STATE OF TEXAS
AUSTIN, TEXAS.**

Request is hereby made on this the 3rd day of July, 1972, for an extension of time in which to file Application to Have the Name of Robert Hainsworth placed on the official ballot for the general election to be held on the 7th day of November, 1972, as an Independent Candidate for the office of State Representative, District 86, in Harris County, Texas.

The reason for this request is that additional time is needed to get more signatures to the Application.

Respectfully submitted,

Robert Hainsworth.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. A-72-CA-111

ROBERT W. HAINSWORTH, Plaintiff

v.

BOB BULLOCK, Secretary of State, Defendant

DEFENDANT'S MOTION TO DISMISS
TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, Secretary of State Bob Bullock, and moves the Court to dismiss said Action for the following reasons, to-wit:

I.

To Dismiss the Action on the ground that this Court does not have jurisdiction and should not take jurisdiction over the subject matter of the Complaint as alleged.

II.

To Dismiss the Action because the Complaint fails to state a claim against Defendant upon which relief can be granted.

III.

To Dismiss the Action because Plaintiff's Petition fails to present a substantial federal question which has not

previously been resolved in the Supreme Court of the United States.

IV.

To Dismiss the Action because Plaintiff alleges in his Original Complaint that the rights here sought to be redressed are rights of citizens guaranteed by the *due process, equal protection, and privilege and immunities* clauses of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sec. 1983 and Sec. 1971, and therefore Plaintiff does not establish jurisdiction allowing this Court to Act on State matters such as this absent a showing of discriminatory activity because of race or Creed, etc., by state officials and this is not sufficiently alleged.

V.

To Dismiss the Action because some parts of the purported allegations and contents of the Original Complaint are vague and distorted and do not state a clear cause of action.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court enter an Order dis-

missing the Complaint filed by Plaintiff herein and for such other relief to which Defendant may be justly entitled.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney
General

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ, III
Assistant Attorney General

SAM L. JONES, JR.
Assistant Attorney General

(CERTIFICATE OF SERVICE OMITTED
IN PRINTING)

NOTICE OF MOTION

TO: Mr. Robert W. Hainsworth
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

Please have notice that the undersigned will bring the above Motion on for hearing before the United States District Court for the Western District of Texas, San Antonio Division, San Antonio, Texas, on the 28th day of September, 1972, at 9:30 o'clock in the forenoon of that day or as soon thereafter at the convenience of the Court.

SAM L. JONES, JR.

**THE JUDGMENT, ORDER OR DECISION
IN QUESTION**

The Memorandum Order and Judgment is set out in the Jurisdictional Statement in the Appendix thereto, at Pages 11 and 12.

Portions of the Memorandum Opinion deemed applicable to this case are set out in the Jurisdictional Statement in Appendix at Pages 13 through 18.

The Order Denying Motion For Rehearing is set out in the Jurisdictional Statement in the Appendix thereto, at Pages 19-21.

OTHER PARTS OF THE RECORD
TO WHICH THE COURT'S ATTENTION
IS DIRECTED

[55]

* * *

A political party candidate had no restrictions as to a person that he could canvass from, every voter was ripe for him to approach, but with respect to an independent candidate, I had to wait until after the Second Primary, and all those voters who had voted were not eligible to me to get their signatures for my application. I went to many places, and many people were willing to sign my application, and I had asked them because there is an oath that has been affixed to the application that reads, "Did you vote in any other primary, Republican or Democratic, in this 1972 year?" and

[56]

I was unable to get many signatures because those people had voted, and I was proscribed against getting that signature.

* * *

[57]

JUDGE THORNBERRY: Well, I will ask you this, Mr. Hainsworth, and it is a fair question, of course, what you are talking about when you talk about the person

who files their Petition to get on the Primary Ballot, all he is doing there is initiating an opportunity to compete with other candidates for quite a number of votes in order to get on the General Ballot. Now, it seems to me that your burden is just to compare the burden that is placed on you as a person who wants to be an independent candidate as against a

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man not only who has to obtain not just the two per cent of the vote or 300 signatures, but he also has to get into a contest with a lot of other candidates for a lot of votes in order to get on the General Election Ballot. Now, is it fair to say that there is some comparison there?

MR. HAINSWORTH: Well, I think so, Your Honor, because one thing that should be observed is this, that many of those candidates, whether Republican or Democratic, who used either method of getting their names on the Ballot, whether it was by the filing of the fee or nominating Petition, they are the only candidate in that race, there is no opponent, they automatically get on the Ballot of the General Election without any kind of contest. There are innumerable instances of where a Democratic candidate and a Republic Party candidate get on the Georgia Election Ballot and don't have any opposition.

JUDGE THORNBERRY: You mean no opposition of any Primaries.

MR. HAINSWORTH: Yes, sir.

JUDGE THORNBERRY: But a lot of times they have pretty stiff opposition.

MR. HAINSWORTH: A lot of times they have, but in this case, an independent has to go to a

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lot of expense and work in getting signatures, and then in addition the independent has this responsibility, the independent, when he gets his name on the Ballot in a General Election, it doesn't mean he is going to get elected, he just has an opportunity to get elected, and an independent doesn't have the political party organization that a Democratic Party candidate has or a Republican Party candidate has, and that equalizes.

JUDGE THORNBERRY: Well, if we could equalize opportunity to get elected, we would really be doing something, I have been through that process, I wouldn't say how many times, but I have never known how to equalize it. Do you have anything further now?

LIBRARY
SUPREME COURT, U. S.

APPENDIX

NO. 7 373
HONORABLE JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, et al.,
Appellants,

versus

BOB BULLOCK, Secretary of State of
Texas, Appellee.

NO. 72-942

ROBERT HAINSWORTH,
Appellant,

versus

MARK WHITE, JR., Secretary of State
of Texas, Appellee.

Appeal from the United States District Court
for the Western District of Texas

No. 72-887 - Docketed December 15, 1972

No. 72-942 - Docketed December 30, 1972

Probable Jurisdiction Noted March 5, 1973

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TEXAS NEW PARTY, TEXAS SOCIALIST WORKERS
PARTY, ET AL. V. BOB BULLOCK, SECRETARY
OF STATE OF TEXAS, In the United States
District Court for the Western District
of Texas, San Antonio Division, No. CA-
72-H-990.

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**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

July 26, 1972 - Complaint filed in U.S. District Court for Southern District of Texas, Houston Division; 2 summons issued (copies to Governor and Attorney General)
July 31, 1972 - Order of Chief Judge John R. Brown constituting 3-Judge Court and consolidating case with W-72-CA-37, MO-72-CA-50 and SA-72-CA-158 in the Western District of Texas, San Antonio Division, filed in duplicate and entered. Case is transferred to the San Antonio Division for consolidation. Parties notified. District Judges D. W. Suttle and John H. Wood, Jr. and Circuit Judge Homer Thornberry comprise the 3-Judge Court.

The following instruments filed while case pending in San Antonio Division of the Western District of Texas:

Aug. 11, 1972 - SUMMONS on Bullock re/ex 8-3-72, filed.
Aug. 11, 1972 - SUMMONS on Smith, re/ex 8-3-72, filed.
Aug. 11, 1972 - Pretrial MEMORANDUM filed. (copies 3 judges, attys for pltf: see memo)
Aug. 15, 1972 - Defts' MOTION TO DISMISS w/supporting Brief filed (copies 3 judges)
Aug. 31, 1972 - STIPULATIONS of Fact, filed (copies 3 judges)
Sep. 7, 1972 - *** 3 JUDGE HEARING: on petitions attacking constitutionality of the election code of the State of Texas. State stipulated that Raza Unida Party and Texas Socialist Workers' Party have complied with all the rules and have been certified to be on the ballot. Arguments of counsel heard and concluded. *** Case taken under advisement.

Sep. 15, 1972 - MEMORANDUM OPINION of Judges Thornberry, Suttle and Wood, filed. (All relief requested by pltfs is denied and the complaints are dismissed; temporary restraining order is dissolved and all signatures obtained during said period are void; all motions not heretofore acted upon are denied; order to be entered)

Sep. 15, 1972 - JUDGMENT of Judges Thornberry, Suttle and Wood, filed. (All relief requested by pltfs is denied and the complaints dismissed; temporary restraining order dissolved and all signatures obtained during said period are null and void; all motions not heretofore acted upon are denied)

Sep. 18, 1972 - Received original case file with above instruments from U.S. District Clerk, Western District of Texas, San Antonio Division.

Oct. 16, 1972 - NOTICE OF APPEAL to the Supreme Court of the United States in behalf of all plaintiffs, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

CA. NO. 72-H- 990

TEXAS NEW PARTY, TEXAS SOCIALIST
WORKERS PARTY, DEBBY LEONARD,
MEYER ALEWITZ, KEN GJENMRE,
BENTON S. RUSSELL, III, BOBBY
CALDWELL, DAVID HALE, RICHARD
GARCIA, ELIZABETH COX and JAMES
DAMON, Individually and on be-
half of all other persons
similarly situated.

Plaintiffs,

vs.

PRESTON SMITH, Individually and
as Governor of the State of Texas
and BOB BULLOCK, Individually and
as Secretary of the State of Texas.

Defendants.

COMPLAINT

1.

PRELIMINARY STATEMENT

Plaintiffs seek to have this Court
declare invalid and enjoin the enforcement
of various provisions of the Texas Election
Code and Article IV, § § 4 & 16 of the Con-
stitution of the State of Texas which are
challenged on the grounds that they are in
conflict with provisions of the First,

Fourteenth and Fifteenth Amendments of the Constitution of the United States. Plaintiffs complain that various portions of the Texas Code infringe upon their rights of expression, association, and their right to vote.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331, 1343, 2201, 2281 & 2284 and 42 U.S.C. § 1971, 1981 & 1983 and Rule 23 of the Federal Rules of Civil Procedure.

PLAINTIFFS

Plaintiffs, Texas New Party (hereafter TNP) is a political party organized statewide in Texas; Ken Gjenmre is an adult citizen of Dallas, Dallas County, Texas, TNP candidate for United States Representative, 5th District of Texas; Benton S. Russell, III is an adult citizen of Houston, Harris County, Texas, TNP candidate for Governor of the State of Texas; Bobby Caldwell is an adult citizen of Houston, Harris County, Texas, TNP candidate for State Representative, 85th District, who also was a candidate in the Democratic primary for that office; David Hale is an adult citizen of Nacogdoches, Nacogdoches County, Texas, who filed for the office of Sheriff of Nacogdoches County after February 7, 1972, but is otherwise qualified to be TNP candidate for that office.

Plaintiffs, Texas Socialist Workers

TSWP) is a political statewide in Texas; Party (hereaf, an adult citizen of party organiz, County, Texas, TSWP can- Richard Garc, States Senator; Debby Houston, Harr, led in Houston, Harris didate for Un, ice September, 1970, and Leonard has r, of age on September 11, County, Texas, ualified to be TSWP can- will be 30 ye, or of the State of Texas; 1972, otherwi, a citizen of Austin, didate for Go, xas, is an adult citizen, Meyer Alewit, otherwise qualified to be Travis County, otherwise qualified to be 21 years of or Lieutenant Governor of TSWP candidates.

the State of Elizabeth Cox is an adult Plaintiff, Travis County, Texas, citizen of Ames Damon is an adult and Plaintiff, Travis County, Texas; citizen of And voters. All Plaintiffs both are qualint as a class action on bring this co, istered voters in the behalf of all, accordance with Rule State of Tex, of the Federal Rules of 23 (a) & (b) Civil Procedu

CLASS ACTION

Plainti, bring this action as a class action pursu, to Rule 23 of the Federal Rules of Civ, ocEDURE on their own be- half and on lf of all other members of their class wish to have an opportunity to consider nees on the ballot other than those o, Democratic and Republi- can parties. to the class, Plaintiffs Russell, Gje, Caldwell, Hale, Garcia, Leonard, Ale, Cox and Damon represent that:

a. The class is so numerous that joinder of all its members is impractical.

b. There are questions of law and fact common to the class.

c. The claims of Plaintiffs Russell, Gjenmre, Caldwell, Hale, Garcia, Leonard, Alewitz, Cox and Damon, are typical of the claims of the class.

d. Plaintiffs, Russell, Gjenmre, Caldwell, Hale, Garcia, Leonard, Alewitz, Cox, and Damon, will fairly and adequately protect the interests of the class.

e. The statutory requirements are generally applicable to the class, thereby making appropriate final relief with respect to the class.

DEFENDANTS

This action is brought against Preston Smith, Governor of the State of Texas and Bob Bullock, Secretary of the State of Texas having their offices in the Capitol Building, Austin, Texas. They are sued individually and in their official capacities.

FIRST CAUSE OF ACTION

V.A.C.S. Article 13.45(2) of the Texas Election Code is unconstitutional, violating the First, Fourteenth and Fifteenth Amendments of the Constitution of the United States for the following reasons:

a. The provisions requiring an aggregate number of voters of at least one percent of the total votes cast for govern-

or in the last preceding election places an undue burden on minority parties.

b. The time limit for gathering signatures for the supplemental petitions is unreasonable and discriminatory, placing an undue burden on minority parties.

c. The provisions which restricts voters signing petitions to be qualified voters, interpreted by the Secretary of State to be currently registered voters, works an undue restriction of voters' participation in the electoral process.

d. The provisions requiring certification of the officer administering the oath is unnecessarily burdensome.

e. The requirement reflected in the oath which excludes persons from signing supplemental petitions who have participated in primary voting places an undue burden on minority parties and fails to reflect a compelling state interest.

f. The provision which requires petitions requesting the names of parties' nominees to be printed on the general election ballot to be submitted within twenty (20) days after the date for holding the parties' state conventions is prejudicial to the nomination of candidates for position on the November general election ballot and is not based on a compelling state interest.

g. The deadline for the nominating petition, inasmuch as it is ninety (90) days prior to the statutory dates of certification of the nominees for the printing of the election ballot, is arbitrary and capricious and places an unreasonable burden on minority parties.

h. The provision which limits signers of the petition to those persons who have not participated in a party primary elect-

ion or in a convention prevents those signers from participating fully in the electoral process and thereby works a denial of equal protection and restricts rights guaranteed by the First Amendment.

i. The requirement of both a convention system and supplemental petitions works an undue burden and hardship on minority parties and results in a denial of equal protection.

j. The requirements pertaining to signers of petitions so restricts the number of potential signers that it places an undue burden on minority parties without reflecting a valid state interest.

The total effect of the aforementioned provisions is unreasonable, burdensome, and so oppressive as to constitute invidious discrimination in violation of the Fourteenth Amendment and places an impermissibly heavy burden upon rights of free speech, petition and association in violation of the First and Fourteenth Amendments of the Constitution of the United States, and in so doing Plaintiffs have been made to suffer and will continue to suffer irreparable injury and harm in that they and all other members of their class shall be excluded from their participation in electoral process on the county, district, state and national levels in the general election, including the right to participate in the election of the President of the United States.

SECOND CAUSE OF ACTION

Article IV, §§ 4 & 16 of the Constitution of the State of Texas and V.A.C.S.

Art. 1.05 of the Texas Election Code are unconstitutional in violation of the First, Fourteenth and Twenty-sixth Amendments to the Constitution of the United States for the following reasons:

a. The five year residency requirement is unduly restrictive in that it excludes persons otherwise qualified for the offices of governor and lieutenant governor by imposing an unduly long residency requirement which has no rational relationship to the state purpose to be served and that it constitutes a restriction on the right of interstate travel in violation of the Fourteenth Amendment's guarantee of equal protection.

b. The age requirement of thirty (30) years for holding the office of governor and lieutenant governor is arbitrary and capricious in that it reflects no compelling state interest and further is in violation of electoral process rights guaranteed by the First Amendment.

THIRD CAUSE OF ACTION

V.A.C.S. Art. 13.12(2) & 13.47a(1) of the Texas Election Code are unconstitutional in violation of the Fourteenth Amendment to the Constitution of the United States for the following reasons:

a. The requirement that candidates file three (3) months in advance of precinct conventions is very burdensome for minority parties using the convention system and no compelling state interest is at the basis of the requirement.

b. The requirement, in that it fails to distinguish the organizational needs and

problems of minority parties from those of majority parties, constitutes discrimination in violation of the Fourteenth Amendment to the Constitution of the United States.

FOURTH CAUSE OF ACTION

V.A.C.S. Art. 13.11 of the Texas Election Code is unconstitutional in violation of the First Amendment to the Constitution of the United States. The provision which makes a person who was a candidate in a primary election ineligible to have his name printed on the ballot at the succeeding general or special election as an independent violates the electoral process rights guaranteed by the First Amendment.

FIFTH CAUSE OF ACTION

V.A.C.S. Art. 6.02 of the Texas Election Code is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States for the following reasons:

a. In that it violates the freedoms of speech and belief guaranteed by the First Amendment to the Constitution of the United States as made applicable to the States, and casts a chilling effect upon such beliefs by requiring from Plaintiffs an oath of ideology before permitting them to participate as candidates in the political process.

b. In that it is devoid of any defi-

nitional standards regarding among other things "our present representative form of government," and is therefore unconstitutional, vague, overbroad and void under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

c. In that it authorizes and mandates a penalty for Plaintiffs political beliefs in the absence of any compelling state need and without regard to the achievement of any valid state objective.

d. In that it arbitrarily and capriciously singles out from among all candidates or nominees for any public office in Texas those persons who do not maintain political beliefs in the status quo, thus depriving Plaintiffs of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully urge the Court to enjoin the Secretary of State from enforcing the June, 1972, deadline for the submission of sworn petitions for nomination.

Plaintiffs further urge this Court to issue a temporary restraining order prohibiting the Secretary of State of the State of Texas from invoking V.A.C.S. Articles 13.45(2), 1.05, 13.12(2), 13.47a (1), and 13.11a of the Texas Election Code.

And Plaintiffs further urge this Court to:

a. Enter its Order finding jurisdiction in this Court as herein alleged.

b. Invoke a three judge Federal Court to test the constitutionality of V.A.C.S. Articles 13.45(2), 1.05, 13.12(2), 13.47a (1) and 13.11a.

c. Declare V.A.C.S. Articles 13.45(2), 13.11a, 1.05, 6.02, 13.12(2), 13.47a(1), of the Texas Election Code and Article IV, §§ 4 and 16 of the Constitution of the State of Texas, to be unconstitutional in their entirety.

d. Declare that V.A.C.S. Article 13.45(2) is unconstitutional in each of the following particulars:

(1) The requirement of the number of names signing the Petition.

(2) The requirement that the names be signed under oath.

(3) The limitation that the person signing the Petition shall not have voted in any primary election or participated in any convention held by any other political party.

(4) That the Petition may not be circulated for signatures until after the date set for the general primary election.

(5) And that the date of the filing of the list of participants in precinct convention and petition requesting names of parties' nominees be printed on general election ballot within twenty (20) days after the date for holding the party state convention.

e. Enjoin the exclusion of the nominees of the Texas New Party and the Texas Socialist Workers Party State Conventions from the general election ballot.

f. For such other and further relief to which Plaintiffs may be entitled under law and in equity and for which they shall ever pray.

Respectfully submitted,

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(AFFIDAVIT OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(TITLE OMITTED IN PRINTING)

DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Defendants, Governor
Preston Smith and Secretary of State Bob
Bullock, and move the Court to dismiss
said Action for the following reasons, to-
wit:

I.

To dismiss the Action on the ground that this Court does not have jurisdiction and should not take jurisdiction over the subject matter of the Complaint as alleged.

II.

To dismiss the Action because the Complaint fails to state a claim against Defendants upon which relief can be granted.

III.

To dismiss the Action because Plaintiffs' Petition fails to present a substantial federal question which has not previously been resolved in the Supreme Court of the United States.

IV.

To dismiss the Action because the Plaintiffs allege in their Original Complaint that the rights here sought to be redressed are rights of citizens guaranteed by the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sec. 1983 and Sec. 1971, and therefore Plaintiffs do not establish jurisdiction allowing this Court to Act on State matters such as this absent a showing of discriminatory activity because of race or Creed, etc., by state officials and this is not sufficiently alleged.

V.

To dismiss the Action because some parts of the purported allegations and contents of the Original Complaint are vague and distorted and do not state a clear cause of action.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Honorable Court enter an Order dismissing the Complaint filed by Plaintiffs herein and for such other relief to which Defendants may be justly entitled.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney
General

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Assistant Attorney General

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(TITLE OMITTED IN PRINTING)

STIPULATIONS OF FACT

TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW the Defendants and the Plaintiffs in Cause No. CA-72-H-990, Texas New Party, et al. v. Preston Smith, Governor and Bob Bullock, and through their respective attorneys of record, stipulate to the following facts for the purpose of this litigation, and agree that the same may be introduced and used as evidence herein:

1. That Plaintiff Ken Gjenmre is an adult citizen of Dallas, Dallas County, Texas.
2. That Plaintiff Ken Gjenmre is the Texas New Party candidate for United States Representative, Fifth District of Texas.
3. That Plaintiff Benton S. Russell, III, is an adult citizen of Houston, Harris County, Texas.
4. That Plaintiff Benton S. Russell, III, is the Texas New Party candidate for Governor of the State of Texas.
5. That Plaintiff Bobby Caldwell is an adult citizen of Houston, Harris County, Texas.
6. That Plaintiff Bobby Caldwell is the Texas New Party candidate for State Representative, 85th District of Texas.
7. That Plaintiff Bobby Caldwell was also a candidate for State Representative,

85th District of Texas, in the 1972 Democratic primary.

8. That Plaintiff David Hale is an adult citizen of Nacogdoches, Nacogdoches County, Texas.

9. That Plaintiff David Hale filed for the office of Sheriff of Nacogdoches County, Texas, after February 7, 1972.

10. That Plaintiff Richard Garcia is an adult citizen of Houston, Harris County, Texas.

11. That Plaintiff Richard Garcia is the Texas Socialist Workers Party candidate for United States Senator from Texas.

12. That Plaintiff Debby Leonard is an adult citizen of Houston, Harris County, Texas.

13. That Plaintiff Debby Leonard has resided in Houston, Harris County, Texas, since September, 1970.

14. That Plaintiff Debby Leonard will be 30 years of age on September 11, 1972.

15. That Plaintiff Debby Leonard is the Texas Socialist Workers Party candidate for Governor of the State of Texas.

16. That Plaintiff Meyer Alewitz is an adult citizen of Austin, Travis County, Texas.

17. That Plaintiff Meyer Alewitz is an adult citizen who is twenty-one (21) years of age.

18. That Plaintiff Meyer Alewitz is the Texas Socialist Workers Party candidate for Lieutenant Governor of the State of Texas.

19. That Plaintiff Elizabeth Cox is an adult citizen of Austin, Travis County, Texas.

20. That Plaintiff Elizabeth Cox is a qualified voter in the State of Texas, and in Travis County, Texas, and in the

City of Austin, Texas.

21. That Plaintiff James Damon is an adult citizen of Austin, Travis County, Texas.

22. That Plaintiff James Damon is a qualified voter in the State of Texas, and in Travis County, Texas, and in the City of Austin, Texas.

23. That under present law, in order for Texas New Party to have its candidates placed on the ballot for the general election, it would have to meet the requirements set out in Article 13.45(2) of the Texas Election Code.

24. That under present law, in order for Texas Socialist Workers Party to have its candidates placed on the ballot for the general election, it would have to meet the requirements set out in Article 13.45(2) of the Texas Election Code.

25. That on December 9, 1971, the Texas Socialist Workers Party filed with the Secretary of State its declaration of intention to nominate candidates by convention.

26. That on February 11, 1972, the Executive Committee of the Texas Socialist Workers Party certified to the Secretary of State the names of persons who had filed with the party on or before February 7, 1972, to be candidates for the party's nominations.

27. That on March 30, 1972, the party rules of the Texas Socialist Workers Party were filed with the Secretary of State.

28. That on June 15, 1972, the Texas Socialist Workers Party filed with the Secretary of State the minutes of its state convention and the names of the nominees selected by the party.

29. That on June 28, 1972, the Texas

Secretary of State voters who the Workers Party filed with the precinct create the lists of qualified above lists participated in the party's 46,000 qualifications, and along with the party's named petitions signed by over for the general voters, who urged that the

30. To be placed on the ballot Secretary of State election.

Texas Secretary of State on August 8, 1972, the should be State certified that the general election Workers Party's nominees

31. To be placed on the ballot for the Texas New Party.

of State on November 5, 1971, the nominate candidates filed with the Secretary

32. Declaration of intention to Executive Committee by convention. certified by convention.

names of party on February 14, 1972, the party on the Committee of the Texas New Party candidates the Secretary of State the

33. Those who had filed with the New Party before February 7, 1972, to be nominating the party's nominations.

of 253 qualified on March 28, 1972, the Texas

34. To be placed with the Secretary of State New Party petitions bearing the signatures of State voters.

35. On April 6, 1972, the Texas New Party filed its rules with the Secretary of State the minutes

names of candidates on June 14, 1972, the Texas Secretary of State with the Secretary of State its state convention and the nominees selected by the party.

STUART M. NELKIN
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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(Note: The District Court's Memorandum Opinion, entered on September 15, 1972, is reprinted in the Jurisdictional Statement at pages 17-36. The District Court's Judgment is reprinted in the Jurisdictional Statement at pages 37-38.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS, HOUSTON DIVISION

(TITLE OMITTED IN PRINTING)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

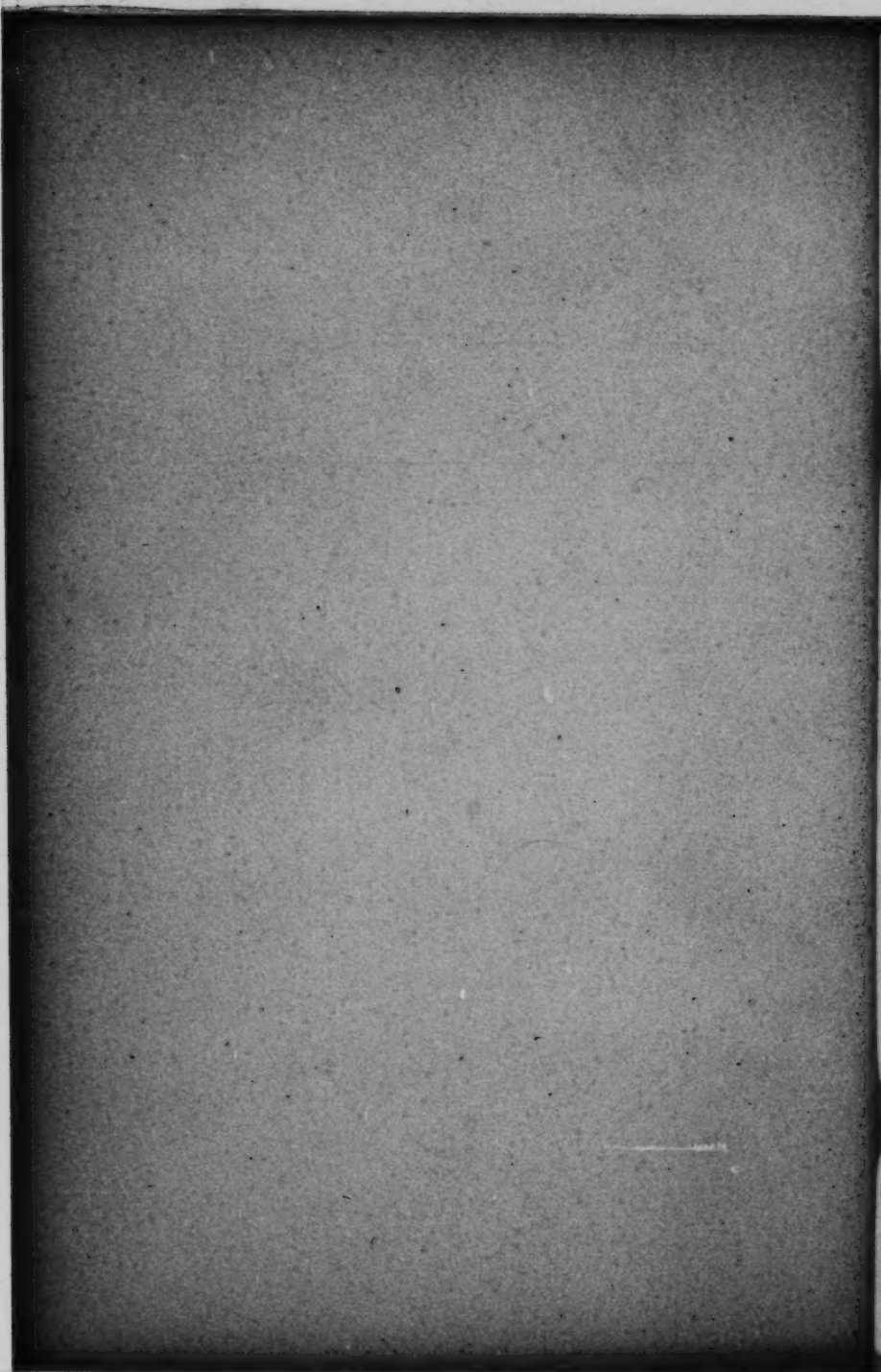
Notice is hereby given that Texas
New Party, Texas Socialist Workers Party,

Debby Leonard, Meyer Alewitz, Ken Gjenmre, Benton S. Russell, III, Bobby Caldwell, David Hale, Richard Garcia, Elizabeth Cox and James Damon, the Plaintiffs in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on September 15, 1972.

This appeal is taken pursuant to 28 U.S.C. 1253.

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Houston, Texas 77002
Attorney for Plaintiffs

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MICHAEL ROEMER, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72 - 887

AMERICAN PARTY OF TEXAS, *et al.*,

Appellants,

versus

BOB BULLOCK, Secretary of State of Texas

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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TEXAS SOCIALIST WORKERS PARTY,
et al.

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TABLE OF AUTHORITIES

Cases:

<i>Bullock v. Carter</i> , 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)	9, 11, 13
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<i>Mitchell v. Donovan</i> , 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970)	2
<i>Rosario v. Rockefeller</i> , 458 F.2d 649 (2 Cir., 1971), cert. granted, 40 U.S.L.W. 3572, May 30, 1972	10

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5,
21 L.Ed.2d 24 (1968) _____ 9, 10, 12

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746,
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Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

RAZA UNIDA PARTY, et al.,

versus

BOB BULLOCK, Secretary of State of Texas

AMERICAN PARTY OF TEXAS, et al.,

Appellants,

versus

BOB BULLOCK

LAURAL DUNN, et al.,

Appellants,

versus

BOB BULLOCK, et al.

**TEXAS NEW PARTY, TEXAS SOCIALIST
WORKERS PARTY, et al.,**

Appellants,

versus

PRESTON SMITH, et al.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS**

JURISDICTIONAL STATEMENT

Appellants, consisting of various minority political parties, their candidates for public office, individuals seeking office as independent candidates, and qualified Texas electors desiring to vote for these candidates, appeal from a final order entered on September 15, 1972 by a Three-Judge Federal District Court, which dismissed four consolidated class actions

seeking declaratory and injunctive relief against certain provisions of the Texas Election Code and related Texas election laws. This jurisdictional statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal, which presents substantial Federal questions not previously resolved by the Court.

The Opinion Below

On September 15, 1972 a Three-Judge Federal District Court convened in the Western District of Texas, San Antonio Division, entered a Memorandum Opinion and Order dismissing each of the four consolidated complaints and denying all relief requested by the Plaintiffs. No other preliminary or interim orders have been entered. As yet unpublished, the District Court's opinion is contained in Appendix A at page 17.

Jurisdiction

The present suits were instituted under the Civil Rights Act of 1871, 42 U.S.C. § 1981 and § 1983, the Voting Rights Act of 1965, 42 U.S.C. § 1971, and the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Because each complaint sought an injunction against Texas statutes of State-wide application, and because each action involved essentially identical issues and claims for basically the same relief, the Chief Judge of the United States Court of Appeals for the Fifth Circuit convened a Three-Judge District Court as required by 28 U.S.C. § 2281 and ordered the four cases consolidated for trial. The District Court's final order denying all declaratory and injunctive relief is contained in Appendix B at page 37. Timely notices of appeal were thereafter filed and are contained in Appendix C at page 39. Appeal to this Honorable Court is based on 28 U.S.C. § 1253.

Among numerous decisions sustaining the jurisdiction of this Court to consider a final order by a Three-Judge Federal District Court granting or denying an injunction are *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and companion cases, *Mitchell v. Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) and *Goldstein v. Cox*, 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970).

Statutes Involved

The challenged provisions of the Texas Election Code, Tex. Rev. Civ. Stat. Ann. Arts. 13.12, 13.45, 13.47 and 13.50 (1967), as amended [hereinafter cited as Texas Election Code or merely by article number] and the McKool-Stroud Primary Financing Law of 1972, Tex. Rev. Civ. Stat. Ann. art. 13.08c-1 are set out in Appendix D at page 44.

Questions Presented

1. Whether the totality of the general election ballot certification requirements imposed on minority parties and independent candidates by the Texas Election Code, including provisions forcing such parties and candidates to obtain the *notarized* signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty, Due Process and Equal Protection guaranteed by the First and Fourteenth Amendments.

2. Whether a State election law prohibiting minority parties and independent candidates from circulating nominating petitions for the general election until after the major party primary elections, and further providing that a voter who has previously participated in a major party's primary election or nominating convention is thereafter ineligible to sign a nominating petition during the same election year, abridges the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

3. Whether a State election law financing major party primary elections but denying financial assistance to minority parties required by State law to incur substantial expense in placing their candidates' names on the general election ballot is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

4. Whether a State election law permitting absentee bal-

loting for a major party candidate but precluding an absentee vote for a minority party or independent candidate is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Statement of the Case

Initially, four separate complaints were filed seeking to enjoin the Secretary of State of Texas from enforcing certain allegedly unconstitutional provisions of the Texas Election Code and related Texas laws.¹ By order of Chief Judge John R. Brown the cases were consolidated for hearing and determination and a single Memorandum Opinion and Order was entered dismissing all complaints of all parties. Pursuant to Rule 15(3) of the Rules of this Court, a single jurisdictional statement is filed on behalf of all appellants in all suits.

In 1968 the Presidential nominee of the American Party of Texas received in excess of 586,000 votes in this State

¹ Raza Unida Party filed suit in April 1972 in the United States District Court for the Western District of Texas, San Antonio Division, seeking an injunction prohibiting the Secretary of State of the State of Texas from invoking Art. 13.45 (2) of the Texas Election Code and directing the Secretary of State to permit absentee voting by La Raza Unida Party. The American Party of Texas filed suit in the United States District Court for the Western District of Texas, Midland-Odessa Division, in May 1972, seeking a Temporary Restraining Order prohibiting the Secretary of State of the State of Texas from invoking Art. 13.45(2) of the Texas Election Code and seeking a Three-Judge Federal Court to consider the constitutionality of that enactment and the McKool-Stroud Primary Financing Law of 1972. Lural N. Dun, et al, filed suit in the United States District Court for the Western District of Texas, Waco Division, in June 1972, seeking a hearing before a Three-Judge District Court and seeking a Temporary Restraining Order against Bob Bullock, et al, as officials of the election enjoining them from enforcing the allegedly illegal and unconstitutional provisions of Art. 13.47a, 13.50, 13.51, 13.52, 13.53, 6.06a, 13.09b, 13.11a and 13.11 and requesting a declaratory judgment that the Election Code complained of is void on its face, and affirmatively seeking an Order that Plaintiffs' names be printed on the General Election ballot. The Texas New Party and Texas Socialist Workers Party, et al, filed suit in the United States District Court for the Southern District of Texas, Houston Division, in July 1972, seeking an injunction against the Secretary of State from enforcing the June 1972 deadline for the submission of sworn petitions for nomination and seeking a Temporary Restraining Order prohibiting the Secretary of State of the State of Texas from invoking Texas Election Code Art. 13.45(2), 1.05, 13.12(2), 13.57a (1) and 13.11a, and further seeking declaration of the Court that Art. 13.45(2), 13.11a, 1.05, 6.02, 13.12(2), 13.47a(1) of the Texas Election Code and Art. 4, Secs. 4 and 16 of the Constitution of the State of Texas are unconstitutional in their entirety and seeking to enjoin the exclusion of the nominees of the Texas New Party of Texas and the Texas Socialist Workers Party State conventions from the General Election ballot.

(approximately 25% of the total cast) in the general election. However, because the American Party did not desire to nominate a *gubernatorial* candidate in the State's 1970 General Election, it was not allowed to have its nominees for any office placed on the 1972 General Election Ballot unless and until it complied with certain onerous, exceedingly expensive and allegedly unconstitutional requirements of Texas Election Code Article 13.45(2). These additional burdens and expenses, as are more fully described hereinafter, were not imposed on either the Democratic or the Republican parties simply because they had proposed gubernatorial candidates in 1970 who had polled in excess of 200,000 votes each. When it became apparent that the American Party, partially due to certain tragic national events, would be unable to comply fully with the cumbersome requirements of Article 13.45(2) within the extremely limited time span allowed, a complaint was filed in the Federal District Court for the Western District of Texas challenging the constitutionality of this and related Texas Election laws and seeking declaratory and injunctive relief.

At about the same time, the Texas New Party and the Texas Socialist Workers Party, realizing that they would probably be denied ballot positions for their Presidential and local candidates because of inability to comply with Article 13.45(2) and, in all events, desiring to avoid the exceedingly cumbersome requirements of that enactment in future elections, filed similar lawsuits in their respective Federal District Courts. Similarly, Laurel Dunn, who desired to run for Congress as an Independent candidate, but who had been unable to comply with the requirements of Texas Election Code Article 13.50, instituted suit on his own behalf and on behalf of all those similarly situated seeking Federal adjudication of the constitutionality of that provision of the Texas Election Code.

The cases were consolidated for hearing and determination by a single Three-Judge Federal District Court constituted pursuant to the provisions of 28 U.S.C. § 2281.

On September 7, 1972 the Three-Judge District Court convened to consider all of the cases which had been filed concerning the Texas Election Code. Each of the political party Plaintiffs challenged the constitutionality of Article 13.45(2) which sets forth the requirements which a new or minority

party must meet in order to have the names of its nominees printed on the General Election Ballot. In Texas, any political party whose candidate for governor in the last preceding election polled at least 200,000 votes nominates candidates for upcoming elections by means of a party primary completely financed by State funds. Plaintiff political parties were not eligible, under Texas law, to nominate by primary election in 1972, nor will the appellants be entitled to conduct primary elections in the next general election. The only alternative means of having the names of its nominees printed on the general election ballot is and will be for these parties to comply with the onerous requirements of Article 13.45 of the Texas Election Code. The burdens imposed by that provision include the following:

(i) Each such party must hold precinct, county, district and state nominating conventions on certain dates prescribed by the statute and coinciding with the conventions and primary election day of major political parties.²

(ii) In order to have the names of its nominees printed on the General Election ballot, the parties must demonstrate that the number of qualified voters attending such precinct conventions amounted to at least one (1%) percent of the total votes cast for Governor in the last preceding general election. If the number of qualified voters attending the precinct conventions is less than the required one (1%) percent, there must be filed, along with the precinct convention attendance lists, a petition requesting that the names of the parties' nominees be printed on the General Election ballot, signed by a sufficient number of additional qualified voters to make the combined total of at least one (1%) percent of the total votes cast for Governor in the last preceding General Election.

(iii) No person may attend a new or minority party convention *or sign its nominating petition* if he has voted at any primary election or participated in any

² Precinct conventions must be held on the first Saturday in May; County conventions must convene on the second Saturday in May; District conventions must take place on the third Saturday in May; and State conventions are required on the second Saturday in June.

convention of any other political party during that voting year, on pain of criminal sanctions.

(iv) The nominating petition may not be circulated until after the date set for the holding of the major parties' primaries and must be filed in the Secretary of State's office within approximately fifty-five (55) days of that date.³

(v) Each person who signs the petition must be administered an oath before a Notary Public at the time he signs the nominating petition.⁴

The Three-Judge District Court determined initially that the fundamental nature of the rights affected demands "exact scrutiny" of the enactments in question and application of the stringent "compelling state interest" test in determining their constitutionality. Regarding the organizational requirements, the Court found the Texas statute to be "obviously more burdensome than the Georgia scheme upheld in *Jenness*⁵ but concluded that on balance the obstacles were justified:

"Following the *Jenness* command to look to the 'totality' of the state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible."

Regarding the prohibition against circulating nominating petitions before the majority parties' primary elections, the Court determined that this requirement was a legitimate exercise of State authority since allowing advance circulation of

³ The petitions must be filed within twenty days after the State convention, which must be held on the second Saturday in June. For the 1972 elections, that translated to June 30 deadline.

⁴ "To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: 'I know the contents of the foregoing petition, requesting the names of the nominees of the Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting years I have not voted in any primary election or participated in any convention held by any other political party.'" Art. 13.45(2).

⁵ *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 24 (1968).

nominating petitions might preclude an early signer from changing his mind and participating in a majority party's primary election or conventions. This provision was also upheld as a reasonable means of reducing the likelihood "that individual voters would become confused or engage in the party process of more than one party."

The requirement that signatures on nominating petitions be notarized was approved by the Three-Judge District Court "for want of a feasible alternative" to enforce criminal sanctions against participating in the political activities of more than one party in any given election year.

The fifty-five (55) day limitation on obtaining signatures on nominating petitions was justified on grounds that a failure to obtain the required number of signatures within that length of time "indicates that the political party involved lacks political support or initiative." Further, the Court agreed with the State that a cutoff period 120 days before the general election "is necessary in order for the Secretary of State to check the validity of the signatures on the petitions as best he can in sufficient time to allow, not only the printing of the ballot, but any legal contests which might arise."

In this piecemeal approach analyzing each provision separately, the Court did not discuss the impact of the "totality" of these provisions or the effect of their interactions.

In addition to challenges to Article 13.45(2) which were raised by all political party plaintiffs, particular plaintiffs individually raised other challenges to various provisions of the Texas Election Code. The American Party of Texas and the Texas New Party objected to the provisions of Article 13.12 and 13.47(a) which requires all candidates including candidates for minority party nominations, to file a formal declaration of candidacy no later than 6:00 p.m. on the first Monday in February, three months preceding the first primary or precinct convention and nine months before the General Election. The Three-Judge District Court dismissed this complaint by asserting that since Article 13.12 applies to all persons, including majority party candidates, no violation of Equal Protection or Due Process is involved.

Several of the Plaintiffs alleged that the failure of the Texas Election Code to allow absentee ballots to be cast for

minority or independent candidates while permitting absentee balloting for majority party candidates constituted a denial of Equal Protection and Due Process. The Three-Judge District Court held, simply, that "Although the State of Texas does not offer any reasons for lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, legislatures are presumed to have acted constitutionally* * *."

Regarding the constitutionality of the McKool-Stroud Financing Law of 1972, the Court considered certain dictum in this Court's opinion in *Bullock v. Carter*, 405 U.S. 134, to be dispositive of the issue: "We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries." 405 U.S. at 139. The Court did not discuss the concept of Equal Protection leading to the conclusion that a State may subsidize major parties' efforts to obtain ballot recognition while denying such financial assistance to new or minority parties which are required by State law to incur substantial expense in order to have the names of its nominees for public office printed on the General Election ballot.

The Questions Presented are Substantial

The Texas political candidacy restrictions that are challenged in this appeal involve State-imposed nominating procedures that in their impact on minority parties and independent candidates, are almost precisely equidistant between the extremely restrictive Ohio enactments invalidated in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) and the relatively liberal Georgia statutory scheme upheld in *Jenness v. Fortson* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).^{*} Aside from the fact that the District Court

^{*} In both *Williams v. Rhodes* and *Jenness v. Fortson* the Court was confronted with State election laws under which minority party and independent candidates for public office, in order to secure a position on the ballot, were required to fulfill requirements materially different from those imposed on the candidates of major political parties. While in *Williams* the Court held that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights amounting to an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment," 393 U.S. at 34, in *Jenness* the Court found that there had been no discrimination, invidious or otherwise, because the State of Georgia had provided "two alternative paths [to candidacy], neither of which can be assumed to be inherently more burdensome than the other." 403 U.S. at 441.

erroneously disregarded the mandate of both *Jenness* and *Williams* to consider the "totality" of the challenged election laws "as a whole," (rather than examining each section of the statute separately and individually), the present appeal provides this Court with an ideal opportunity to address the most significant issue left unanswered in the previous cases — namely, by what specific standard and criteria is the "totality" of a challenged nominating system to be tested for constitutional viability.

In this regard the decisions of lower Federal Courts since *Jenness* have exemplified considerably diverse conceptions of the appropriate analytical criteria. Thus, while almost all decisions agree that the "totality" of a State's alternative path for minority party and independent candidates must be considered in assessing its comparative impact on the candidate's opportunity to compete with major political parties in marshalling electoral support, many of the cases have entailed attempts to resolve the problem by concentrating on one factor or set of factors — for example, the percentage of voter signatures required on nominating petitions — while foregoing altogether any meaningful evaluation of how that particular restriction interacts with all other statutory hurdles impeding access to the ballot. See e.g., *Jones v. Hare*, 440 F.2d 685 (6 Cir., 1971), *cert. denied*, 404 U.S. 911; *Rosario v. Rockefeller*, 458 F.2d 649 (2 Cir., 1971), *cert. granted*, 40 U.S.L.W. 3572, May 30, 1972.

Clearly this pronounced tendency to foresake plenary consideration of the "totality" of the State's statutory restrictions on candidacy and to substitute more or less individualized scrutiny of specific ballot certification requirements (any one of which, when considered singly and in the abstract, may not impose particularly unreasonable or onerous burdens on candidacy) is not in accord with the dictates of *Williams* and *Jenness*. Yet the District Court below as have so many other lower courts, fell into precisely this error by examining each of the manifold Texas restrictions on candidacy without regard to its interrelationship with the others; after concluding that each separate aspect of the Texas system was individually constitutional, the District Court simply asserted, without any real elaboration of its underlying reasoning, that the entirety was constitutional as well. In order for the Federal Courts to undertake any truly meaningful appraisal of State candi-

dacy requirements in the future, it is necessary for this Court to delineate in more detail the relevant considerations appropriate to a consistently rational determination of whether the "totality" of restrictions on minority party and independent candidacy places an impermissibly discriminatory burden on such candidacy. This appeal provides the ideal context for further development of such standards.

Although three of the four questions presented for review are framed in terms of the specific prohibitions on independent and minority candidacy imposed by various provisions of the Texas Election Code, the thrust of Appellants' attack is that all of these restrictions, when considered together and in terms of their total impact on a candidate's opportunity to appear on the ballot, clearly erect impermissibly burdensome, complicated and expensive barriers against minority parties and independent candidates in violation of the Fourteenth Amendment's guarantee of equal protection of the laws.

Under the decisions of this Court distinguishing between the permissible and impermissible methods which a State may employ to accomplish the legitimate objective of insuring that only bona fide candidates are placed on the ballot, this appeal plainly presents substantial Federal questions not previously considered by the Court. Given the fundamental character of the political rights involved and the existence of four sharply defined constitutional issues, the Court should accept the opportunity presented by the facts of these cases to further clarify and define the appropriate constitutional standards governing State candidacy restrictions and "to examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

Moreover, given the multitude of pending cases involving State nominating procedures for minority party and Independent candidates, the Court should take into account the fact that the formulation of authoritative guidelines in the present appeal would not only facilitate appropriate resolution of these problems in the lower courts but would also help to insure that the legitimate political aspirations of national minority candidates are not frustrated by a dilution of their support as the result of their inability to meet Texas's un-

reasonably restrictive requirements as a prerequisite for a place on the General Election ballot. The exclusion of a bona fide national candidate from a ballot position in Texas directly dilutes the quality of the vote for this candidate by limiting his potential electorate. Consequently, this appeal squarely raises issues that are national in scope, since the exclusion of a national candidate from the ballot in one of the country's largest States adversely affects his strength nationwide.

Plainly the Texas system is constitutionally infirm in at least four material respects. First, the totality of the restrictions which Texas imposes on minority party and Independent candidates is substantially greater than the burdens of the Georgia statutory scheme approved in *Jenness v. Fortson*. Unlike Georgia, Texas imposes on minority political parties "the Procrustean requirement" of establishing elaborate party organizational machinery entailing compliance with a labyrinth of details which commence fourteen months before the General Election and continue through precinct, county, district and state conventions and reporting relative thereto. Unlike Georgia, Texas limits the available pool of signatures for nominating petitions to those individuals who have not previously participated in an established party's primary election or nominating convention. Unlike Georgia, which allows six months for securing signatures on nominating petitions, Texas limits the time within which signatures must be collected to approximately 55 days. Unlike Georgia, Texas excludes from its nominating petitions the signatures of qualified electors who are not registered to vote. Unlike Georgia, Texas requires that all signatures on nominating petitions be notarized, a cumbersome, time-consuming and expensive procedure at best. Finally, unlike Georgia, the Texas system is not an indisputably open one; any system that excludes from the ballot a viable national party candidate is certainly precariously close to being, if not "frozen" in the sense suggested by *Williams v. Rhodes*, at least thoroughly chilled.

The second defect in the Texas system is its plain and inescapable bias toward absolute political orthodoxy and major party hegemony, implicit in the requirement that a voter who has previously participated in a party primary election may not thereafter sign a minority party's nominating petition. Since Texas law does not permit minority parties to

collect signatures until the day *after* the major party primaries, it has discriminated against minority parties and independent candidates by providing the established parties with the first opportunity to secure an irrevocable commitment from the electorate, in violation of the Fourteenth Amendment's guarantee of equal protection of the law; and it has also, and perhaps more significantly, limited the individual voter's political participation to a choice between supporting all the nominees of an established political party or forsaking the primaries and supporting only minority party or Independent candidates. Thus, a voter in Texas could never support the nomination of both major party candidates and minority or Independent candidates during the same election year. Such a system, which limits the individual's political associations to one conglomerate of nominees, is inherently antithetical to the postulate of ideological heterodoxy implicit in the First Amendment.

The third constitutional flaw in the Texas scheme is its method for financing party primaries. Following this Court's decision in *Bullock v. Carter* the Texas Legislature enacted the McKool-Stroud Primary Financing Law of 1972, which provides a comprehensive financing plan for major political parties but which denies any financial assistance whatever to minority parties. While the Court in *Bullock v. Carter* did suggest very plainly that a State might make rational distinctions in implementing primary financing plans, it most assuredly did not imply that a State might simply exclude minority parties altogether. Such patently discriminatory tactics in the distribution of public funds is manifestly violative of the Equal Protection Clause, particularly because Texas, in its four stage convention scheme and notarization requirements demands that new or minority political parties expend substantial sums to achieve ballot certification.

Finally, the State of Texas has given established political parties an even greater advantage over small or newly formed parties by permitting absentee balloting for up to forty days preceding the primary elections, without providing any equivalent opportunity to minority parties or Independent candidates. In effect this advance vote provides the major parties with an even better chance to lure voters into an irrevocable decision before the available choices between nominees and

their positions on political issues have crystallized. The irony of this result is accentuated when it is remembered that the rationale given by the Three-Judge District Court to justify the prohibition against circulating nominating petitions until after the major party primaries was that, "if the petitions are circulated well in advance of the precinct conventions and primary elections, a voter may sign before another party's position has crystallized and the voter would be precluded from changing his mind." But that is precisely the consequence of the statutory requirements prohibiting minority parties from obtaining signatures on nominating petitions until after the major party primaries while granting major parties a three week head start in the race to commit support by allowing them to accept absentee votes in primary elections.

In Texas all political candidates are equal, but some are more equal than others.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Anthony Maness, a member of the Bar of the Supreme Court of the United States and the attorney for the Texas New Party, Texas Socialist Workers Party, et al., Appellants herein, hereby certify that on the 15th day of December, 1972, I have mailed three copies of the foregoing Jurisdictional Statement to opposing counsel at the following address: The Honorable Crawford Martin, Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711. I certify that all parties required to be served have been served.

MICHAEL ANTHONY MANESS

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

RAZA UNIDA PARTY, ET AL

v.

SA-72-CA-158

**BOB BULLOCK, SECRETARY OF
STATE OF TEXAS**

AMERICAN PARTY OF TEXAS, ET AL

v.

MO-72-CA-50

BOB BULLOCK

LAURAL DUNN, ET AL

v.

W-72-CA-37

BOB BULLOCK, ET AL

**TEXAS NEW PARTY and
SOCIALIST WORKERS PARTY,
ET AL**

v.

CA-72-H-990

**PRESTON SMITH, GOVERNOR OF
TEXAS and BOB BULLOCK**

MEMORANDUM OPINION

**Before THORNBERRY, Circuit Judge; SUTTLE, District
Judge; and WOOD, District Judge**

SUTTLE, District Judge

The various plaintiffs, comprised of minor political parties, their candidates for public office, qualified voters wishing to vote for candidates of these political parties, and individuals desiring to run for public office as independent candidates, bring class actions seeking to have this Court declare invalid certain provisions of the Texas Election Code,¹ and related

¹ Tex. Rev. Civ. Stat. Ann. art. 1.01 *et seq.* (1967) [hereinafter cited as the Texas Election Code]. The major provision challenged by plaintiffs is Article 13.45(2), which is set out in Appendix "A."

Texas election laws. They also seek to enjoin the Texas Secretary of State from enforcing the challenged enactments. The statutes involved are all statewide in their application, and their constitutionality is questioned on the basis that they violate the First and Fourteenth Amendments to the United States Constitution by infringing on the right of association, free speech, equal protection and due process. The plaintiffs seek declaratory and injunctive relief under 28 U.S.C. § 1343(3) (4); § 2281; and 42 U.S.C. § 1971, § 1981, and § 1983. It is undisputed that the necessary jurisdictional requirements pursuant to 28 U.S.C. § 2281 have been met to require the convening of a three-judge court to determine the issues.²

The District Court granted an Order restraining the Secretary of State from refusing to accept any signatures gathered on nominating petitions by the Raza Unida and American Parties between June 30, 1972 and September 1, 1972. The validity of any signatures obtained during this period was conditioned upon the determination on the merits by this three-judge Court. While the individual cases involved herein do not raise identical issues, the general nature of their challenges against the Texas Election laws are similar, and by Order of July 28, 1972, the cases were consolidated for hearing and determination before this three-judge Court.

Texas affords four alternative methods of nominating candidates to the ballot for a general election. First, candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only.³ Second, candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor, may be nominated by primary election or by nominating convention.⁴ Third, candidates of parties whose candidates polled less than 2% of the total gubernatorial vote in the last general election, and parties who did not have a nominee for governor in the last general election, may be nominated by convention only, or by fulfilling additional requirements set out in article 13.45(2)

² See *Linda S. v. Richard D.*, 335 F.Supp. 804, 806 (N.D. Tex. 1971).

³ Texas Election Code, art. 13.02 (1967).

⁴ *Id.*, art. 13.45(1) (Supp. 1972).

of the Texas Election Code. Fourth, nonpartisan and independent candidates' names may be printed on the ballot after fulfilling the qualifications set out in article 13.50 of the Texas Election Code.

Plaintiffs Raza Unida Party, the American Party of Texas, the Socialist Workers Party, and the Texas New Party all fall into the third category. Therefore, the thrust of these plaintiffs' attack goes to the constitutionality of article 13.45 (2). The other plaintiffs represented by Loral N. Dunn are independent candidates who challenge the constitutionality of article 13.50. Several of the candidates individually challenge the filing requirements of article 13.47a; the age and residency requirements of article 1.05 and Article IV, §§ 4 & 16 of the Texas Constitution; the loyalty oath required by article 6.02; the prohibition in article 13.09(b) against write-in candidates; the "anti-raiding" statute, article 13.11a; and the uniform primary test required by article 13.11. Finally, the American Party of Texas seeks to have this Court declare unconstitutional the McKool-Stroud Primary Financing Law of 1972.⁵

This is another one of those cases where we as Judges are expected to don the "awesome mantle of omnipotence and unerring clairvoyance" to determine if Texas legislation operates to unconstitutionally burden the rights of voters, political parties, and their candidates.⁶ While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process,⁷ and those on the other end which do not,⁸ this case presents a new combination which falls squarely in the middle. Because we believe that Courts should exercise restraint in overturning State laws unless clearly unconstitutional, we find that the totality of the Texas Election Code serves a compelling state interest and does not operate to suffocate the election process. Accordingly, we deny all relief requested by plaintiffs.

⁵ Tex. Laws, 2nd Spec. Sess., ch. 2, § 1, at 7 [text set out in Appendix "B"].

⁶ See *Graves v. Barnes*, 343 F.Supp. 704, 750 (W.D. Tex. 1972) (Wood, J., concurring and dissenting).

⁷ *Williams v. Rhodes*, 393 U.S. 23 (1968).

⁸ *Jenness v. Fortson*, 403 U.S. 431 (1971).

I.

Defendants move to dismiss the complaints in *Raza Unida Party v. Bullock* and *Socialist Workers Party v. Bullock* wherein they challenge art. 13.45(2) of the Texas Election Code. Defendants argue that plaintiffs in the two suits lack standing, and that their cases are moot, because, after their suits were filed, the Texas Secretary of State on August 8, 1972, certified that Raza Unida Party and the Socialist Workers Party had complied with the provisions of art. 13.45(2) and should be placed on the ballot for the November general election. The plaintiffs admit that they could receive no further relief from this Court in this election year. Nevertheless, plaintiffs maintain that they are proper parties who continue to present a justiciable "case or controversy" because excessive funds were spent by them this year in order to comply with the burdensome procedures of the Texas Election Code, and they want assurance that they will not have to repeat the process in the next election year.

The issues presented by the Raza Unida Party and Socialist Workers Party suits with regard to art. 13.45(2) are the same as those presented by the other parties to this suit who have not met the requirements. Thus, the issues are preserved for this Court's determination. Nevertheless, the Court finds that these two parties now lack the requisite "personal stake in the outcome" necessary to preserve jurisdiction in this Court.⁹ Accordingly, defendant's Motions to Dismiss Raza Unida Party and the Socialist Workers Party are granted. This dismissal is limited to those issues presented with regard to the party obtaining a place on the ballot pursuant to art. 13.45(2), and in no way precludes individual candidates' challenges to other provisions of the Texas Election Code.

II.

Since *Yick Wo v. Hopkins*,¹⁰ the "political franchise of voting" has been considered a fundamental Constitutional right. The states, of course, are empowered to pass laws regu-

⁹ *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969); cf. *Laird v. Tatum*, U.S., 40 U.S.L.W. 4850, 4853-54 n.7 (June 26, 1972).

¹⁰ 118 U.S. 356 (1886).

lating the selection of electors by Art. II, § 1 of the United States Constitution. However, any notion that Art. II, § 1 gives the states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other Constitutional provisions, has been rejected by the United States Supreme Court in *Williams v. Rhodes*.¹¹ In striking down as too burdensome Ohio election laws regulating the placement of minority parties on the ballot, the Court in *Rhodes* discussed the Constitutional provisions protecting voting rights:

In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said [the same] with reference to the right to vote¹²

Although the respondent in this case urges that the traditional "rational basis" test¹³ ought to be applied in determining whether the Texas election laws violate equal protection, the Supreme Court consistently has applied the "com-

¹¹ 393 U.S. 23, 29 (1968).

¹² *Id.* at 30-31 (footnotes omitted).

¹³ Under this traditional standard the Court must determine "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Turner v. Fouche*, 396 U.S. 346, 362 (1970).

elling state interest" test¹⁴ in voting rights cases to determine whether the state's Constitutional power to regulate justifies limiting first amendment freedoms.¹⁵ Primaries as well as general elections have been subjected to this exacting scrutiny.¹⁶

In *Bullock v. Carter*, *supra*, the Court for the first time applied the compelling state interest test to restrictions on candidacy.¹⁷ The Court stated that to determine which standard to use when reviewing state regulations barring candidate access to the primary ballot, it is essential to examine the extent and nature of the regulations' impact on the voters. The Court concluded that because the Texas Filing Fee Law had an appreciable impact on voters' exercise of the franchise and because this impact was related to the resources of the voters supporting a particular candidate, the state must justify its restrictions under the stricter standard. By this standard

¹⁴ Under the [compelling interest] standard a state must show both that it has a compelling interest which justifies its laws and that the distinctions drawn by the law are necessary to further its purpose. *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 60, 93 n.30 (1969).

¹⁵ *Bullock v. Carter*, 405 U.S. 134 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 241 (1970) (Brennan, White & Marshall, JJ., concurring and dissenting); *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams vs. Rhodes*, *supra*. Cf. *Harper v. Virginia Bd. of Election*, 383 U.S. 663 (1966). Accord *Yale v. Curvin*, No. 4833, 41 U.S.L.W. 2056 (D. R.I., July 18, 1972); *Manson v. Edwards*, No. 38325, 41 U.S.L.W. 2055-56 (S.D. Mich., July 17, 1972); *Peoples Party v. Tucker*, No. 72-102, 41 U.S.L.W. 2005 (M.D. Pa., June 7, 1972); *Ferguson v. Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972); *Nagler v. Stiles*, 343 F.Supp. 415 (D. N.J., May 26, 1972); *Pontikes v. Kusper*, No. 71-C-2363, 40 U.S.L.W. 2648 (N.D. Ill., March 9, 1972); *Socialist Workers Party v. Welch*, 334 F.Supp. 179 (S.D. Tex. 1971); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, 989 (S.D.N.Y.), *aff'd*, 400 U.S. 806 (1970).

¹⁶ E.g. *Bullock v. Carter*, *supra*; *Smith v. Allwright*, 321 U.S. 469 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Manson v. Edwards*, *supra*. Contra *Wood v. Putterman*, 316 F.Supp. 646 (D. Md.), *aff'd*, 400 U.S. 859 (1970).

¹⁷ Respondent's distinguishing argument that the Supreme Court has applied the compelling state interest test only in those cases where an individual's right to vote was absolutely prohibited is in error. The Court in *Rhodes* applied the test under exactly the same circumstances as exist in this case. Likewise Respondent is wrong where he states that *Bullock v. Carter* utilized the rational basis test. In *Bullock*, the Supreme Court for the first time attached fundamental status to candidacy so as to invoke a rigorous standard of review. In fact, *Bullock* was relied upon and cited in *Dunn v. Blumstein* as authority for the compelling state interest test.

the Court must now analyze the impact which the totality¹⁸ of the Texas Election Code has upon the voters.

III.

In order to have the names of its nominees printed on the general election ballot, a new or minority party must meet the following requirements of article 13.45 (2) :

1. A list of participants in each precinct convention must be signed and certified by the temporary chairman listing the names, addresses (including street or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions. The names on this list must total at least 1% of the total votes cast for governor at the last preceding general election. This year, the total needed was approximately 22,000 signatures.

2. If the number of qualified voters attending the precinct conventions is less than the required 1%, there must be filed, along with the precinct lists, a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least 1% of the total votes cast for governor in the last preceding general election. The address and registration certificate number of each signer must be shown on the petition.

3. No person who, during the voting year, voted at any primary election or participated in any convention of any other party may attend the minority party convention or sign the petition or the signature will be void and that person subject to criminal penalties.

4. The petition may not be circulated for signatures until after the date set for the holding of the major parties' primaries.¹⁹ Signatures must be certified to the Secretary of

¹⁸ In *Williams v. Rhodes*, *supra*, the majority (393 U.S. at 34), concurring (393 U.S. at 39) (Douglas, J.), and dissenting (393 at 62) (White, J.) opinions each pointed to the "totality" of the law to find it unconstitutional. *Accord Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262, 1268 (S.D. Ohio 1970), *appeal dismissed*, 405 U.S. 949 (1972); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, 989 (S.D.N.Y.), *aff'd*, 400 U.S. 806 (1970).

¹⁹ Primaries must be held on the first Saturday in May. Texas Election Code, art. 13.47 (Supp. 1972).

State's office before 20 days after the date for holding the party's state convention.²⁰ This year minority parties had from May 6th until June 30th, or approximately 53 days, to gather signatures.

5. Each person who signs a petition must be administered an oath²¹ before a notary public at the time he signs.

Plaintiffs contend that these requirements, singly and in totality, impede the election process, the right of association guaranteed by the First Amendment, and are violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The State of Texas argues that it has a compelling interest in requiring some minimum amount of public support before placing a candidate's name on the ballot and in assuring that all candidates are in fact seeking elective office in good faith. The Court agrees that these are valid state objectives.²² A review of the decisions since *Williams v. Rhodes*, *supra*, leads this Court to conclude that the totality of the scheme required by article 13.45(2) is not constitutionally impermissible. The Supreme Court in *Jenness v. Fortson*, *supra*, balanced Georgia's "relatively high" 5% petition requirement against the absence of oppressive party organization requirements, voter cross-over prohibitions, or a restrictive petition circulating time period. Likewise, Texas' lenient 1% petition requirement must be balanced against its more burdensome party organization, circulation, and anti-raiding requirements.

Certainly the minimal 1% required by Texas to show voter support as a condition for ballot position serves a legitimate state objective. Percentage requirements of 15%, 7%, and 2% have been struck down by some Courts.²³ But other Courts

²⁰ State conventions must be held on the second Saturday in June. *Id.*

²¹ To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: "I know the contents of the foregoing petition, requesting the names of the nominees of the..... Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party." Art. 13.45(2).

²² *Bullock v. Carter*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. at 442; *Williams v. Rhodes*, 393 U.S. at 32.

²³ *Williams v. Rhodes*, *supra* (15%); *Peoples Party v. Tucker*, No.

have upheld percentage requirements ranging from 1% to 5%.²⁴ Even in *Williams v. Rhodes*,²⁵ the Court noted the lenient 1% requirements of a vast majority of the states. Although any percentage requirement is necessarily going to be arbitrary, 1% is a fair minimum to serve the state's compelling interest in this regard.

The Court in *Jenness*, 403 U.S. at 441, pointed out that "a large reason" for the invalidation of the Ohio election scheme in *Williams* was Ohio's requirement that small parties establish "elaborate statewide, county-by-county, organization paraphernalia." The Texas requirement of precinct, county, and state conventions is obviously more burdensome than the Georgia scheme upheld in *Jenness*, but is clearly more hospitable to new or small parties than was the "entangling web of election laws" invalidated in *Williams*. Following the *Jenness* command to look to the "totality" of a state's requirements, and balancing Texas's burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible.

Plaintiffs challenge the provisions of article 13.45(2) which prevent the circulation of minority party nominating petitions until the day following the majority parties' primary elections, and then prohibit anyone who has voted in a primary from signing a minority party petition. The State argues that the requirement that a new party hold a precinct convention on primary day affords that party an equal opportunity with all other parties to attract the voter to its political process. Thus, if the party has at least 1% support, and the people attend the convention, there is no need for the petition requirement at all. Additionally, if the petitions are circulated well in ad-

72-102 (M.D. Pa., June 7, 1972) (2%); *Socialist Workers Party v. Rhodes*, 318 F.Supp. 1262 (S.D. Ohio (1970), appeal dismissed, 405 U.S. 949 (1972)) (7%).

²⁴ *Jenness v. Fortson*, supra (5%); *Jones v. Hare*, 440 F.2d 685 (6th Cir.), cert. denied, 404 U.S. 911 (1971) (1%); *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D. Ill.), aff'd, 403 U.S. 431 (1971) (5%); *Moore v. Board of Elections*, 319 F.Supp. 437 (D.D.C. 1970) (2%); *Wood v. Putterman*, 316 F.Supp. 646 (D. Md.), aff'd, 400 U.S. 859 (1970) (3%); *Peoples Constitutional Party v. Evans*, 83 N.M. 303, 491 P.2d 520 (1971) (3%).

²⁵ 393 U.S. at 33 n.9.

vance of the precinct conventions and primary elections, a voter may sign before another party's position has crystallized and the voter would be precluded from changing his mind. Third, the State argues that by delaying the petition circulating process until after the primary election, there is less chance that individual voters will become confused or engage in the party process of more than one party.

We agree with the State's contentions. The Courts recognize a state's compelling interest to preserve the integrity of its election process.²⁶ Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. "He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*, [369 U.S. 186 (1962)]."²⁷ Several Courts have found that a state has an interest in preventing "raiding," whereby members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. So long as these "anti-raiding" provisions are narrowly drawn, as is the challenged Texas provision, the right of disaffected voters to associate in a new political party is not unduly burdened.²⁸

Likewise, the provision of article 13.45(2) which requires the administering of a prescribed oath before a notary to those signing the petitions serves a compelling interest to insure

²⁶ *E.g. Rosario v. Rockefeller*, 458 F.2d 649, 652 (2nd Cir. 1972), cert. granted, 40 U.S.L.W. 3572 (May 30, 1972); *Briscoe v. Kasper*, 435 F.2d 1046, 1054 (7th Cir. 1970); *Lester v. Board of Elections*, 319 F.Supp. 505, 509 (D.D.C. 1970); *Socialist Workers Party v. Rockefeller*, supra, 314 F.Supp. at 993.

²⁷ *Jackson v. Ogilvie*, 325 F.Supp. at 867.

²⁸ Compare Texas Election Code, art. 13.45(2) [voter cannot participate in majority party primary and minority party election process in the same election year] with *Rosario v. Rockefeller*, supra [held constitutional a statute requiring voter to be enrolled as a party member prior to the previous general election before he can vote in the primary]; *Lippitt v. Cipollon*, 404 U.S. 1032 (1972), aff'd, 337 F.Supp. 1406 (N.D. Ohio 1971) [held constitutional a statute prohibiting candidacy in party primary if person voted as a member of a different political party in the past preceding four years]; *Yale v. Curvie*, No. 4883, 41 U.S.L.W. 2056 (D.R.I., July 18, 1972) [held unconstitutional statute prohibiting vote in primary of any political party if voted in primary of another political party in preceding 26 months]; *Pontikes v. Kasper*, No. 71-C-2363, 40 U.S.L.W. 2848 (N.D. Ill., March 9, 1972) [held unconstitutional statute prohibiting vote in primary if voted in primary of another party within preceding 23 months]; *Nagler v. Stiles*, 343 F.Supp. 415 (D.N.J. 1972) [held unconstitutional statute requiring that two successive primaries must elapse before voter may switch parties].

that participants in one party's nominating process do not participate in another's. When questioned by the Court in oral argument, counsel for Raza Unida Party admitted that the oath and notary requirements did not hinder their efforts to secure signatures. There is apparently no workable alternative to the requirement that each person who signs a petition be administered an oath if the state is to be able to enforce its criminal penalties against cross-over voting and apprise the voters of these possible penalties. Given the state's interest in insuring that different candidates for the same office are supported by different voters, we uphold the oath requirement for want of a feasible alternative.

The State advances two arguments in support of its requirement that a new party circulate and obtain within a 55-day period (120 days before the general election) the required signatures to be filed with the Secretary of State. First, a failure to obtain the required 1% at precinct conventions, and in the 55 days thereafter by petition, indicates that the political party involved lacks political support or initiative. The Court agrees that the requirements must not be unduly burdensome due to the fact that two minor political parties obtained a place on the ballot by fully complying with every provision of the Texas Election Code. Second, the State argues that a cut-off period of 120 days is necessary in order for the Secretary of State to check the validity of the signatures on the petitions as best he can in sufficient time to allow, not only the printing of the ballot, but any legal contests which might arise.²⁹

Of course, "administrative convenience...alone may not be invoked to impinge upon the exercise of important Constitutional rights."³⁰ While the State has shown a valid interest which must be recognized, the plaintiffs have made no showing that these requirements have actually denied to them rights secured by the United States Constitution.³¹ We can

²⁹ In this connection, article 1.03(2) of the Texas Election Code requires the Secretary of State to certify the candidates nominated for office to the county clerks at least 30 days prior to the general election. The State argues that it actually needs longer than 30 days in order to let the bids on the printing of ballots, etc.

³⁰ *Ferguson v. Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972).

³¹ Compare *Jackson v. Ogilvie*, 325 F.Supp. at 869 [64 days]; *Moore v. Board of Elections*, 319 F.Supp. 437, 438 (D.D.C. 1970) [54 days].

find nothing in this system which abridges the rights of free speech and association secured by the First and Fourteenth Amendments.

Nor does the Court find a violation of Equal Protection. The states have broad discretion in formulating election policies. *Williams v. Rhodes*, 393 U.S. at 34. The Supreme Court in *Jenness v. Fortson*, 403 U.S. at 441 recognized that holding primary elections involved burdens equal to those encountered in circulating nominating petitions. But, as demonstrated by the successful attempt of the Raza Unida and Socialist Workers Parties, the provisions of article 13.45(2) do not operate to "freeze the political status quo." *Jenness v. Fortson*, *supra*. As the Court aptly stated in *Tansley v. Grasso*:

It may well be that the plaintiffs have strong feelings that this legislative distinction creates an unnecessary burden upon prospective candidates for public office, however, if their claim has any merit their proper forum is before the state legislature. The plaintiffs have shown no invidious discrimination.³²

Accordingly, plaintiffs' challenges to the Constitutionality of article 13.45(2) are found to be without merit and are denied.³³

IV.

Plaintiffs, American Party of Texas and Texas New Party, challenge the constitutionality of article 13.47a, which requires that a person comply with the provisions of article 13.12 in filing his intention to become a candidate. Article 13.12 provides that the application may not be filed later than

³² 315 F.Supp. 513, 519 (D. Conn. 1970).

³³ The Texas New Party also challenges the provisions of article 13.45(2), which require the signers of nominating petitions to be currently registered voters. The contention was mentioned only once in the New Party Complaint (Pt. 6c), and was not briefed by either side. Clearly the requirement that all voters be currently registered voters is not Constitutionally infirm. If plaintiffs are attempting to challenge the durational residency requirements of the statute, they have done so improperly. No allegations were offered that any of the plaintiffs were denied the right to vote because of the registration requirements. In fact, plaintiffs stipulated that Elizabeth Cox and James Damon, voters joining in the New Party suit, are both *qualified* voters. Thus, this issue is not properly before the Court and need not be decided.

6 p.m. on the first Monday in February (or February 7, 1972 this year), three months preceding the primary or convention. Because the American Party does not allege that any of its candidates were denied the ballot because of failure to comply with this provision, it lacks standing to contest this issue. However, plaintiff David Hale, who filed as a New Party candidate for the office of Sheriff of Nacogdoches County, Texas after February 7, 1972, preserves this issue for our determination.

The State requires all persons, including those who seek election in party primaries, to file on the same date. Therefore, plaintiff's contentions that the provision is violative of equal protection and due process are without merit. Similar contentions were recently rejected in *Socialist Workers Party v. Rhodes*:

The state has an interest in having persons who otherwise qualify for ballot position officially become candidates at a designated time prior to an election. In addition, the state may reasonably require that all persons seeking elective office become officially declared candidates on or before a certain date preceding an election. One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process.³⁴

Accordingly, plaintiff Hale's prayer to enjoin the defendant from refusing to place his name on the ballot due to his failure to comply with articles 13.47a and 13.12 is denied.

V.

Plaintiff Debby Leonard, Socialist Workers Party candidate for Governor of Texas, and plaintiff Meyer Alewitz, Socialist Workers Party candidate for Lt. Governor of Texas, challenge the constitutionality of the age and residency requirements for those offices imposed by Article IV, §§ 4 & 16 of the Texas Constitution. Because neither of these plaintiffs have alleged that they were denied access to the ballot for

³⁴ 318 F.Supp. 1262, 1273 (S.D. Ohio 1970), appeal dismissed as moot sub nom. *Gilligan v. Sweetenham*, 405 U.S. 949 (1972).

failure to meet the residency requirement, they have no standing to challenge this provision, and we cannot entertain the issue. They do, however, present a justiciable question regarding the age requirement.

Article IV, §§ 4 & 16 of the Texas Constitution provides that the Governor and Lt. Governor of the State of Texas "shall be at least 30 years of age . . ." Plaintiff Meyer Alewitz is presently 21 years of age. Plaintiff Debby Leonard was 29 years old when she filed, but will be 30 on September 11, 1972 before the general election. Otherwise, each are qualified to hold these elective offices. The parties have not informed the Court whether the Secretary of State interprets the provision as requiring a candidate for these offices to be 30 years of age at the time of filing; the statute is also silent on the matter. For purposes of this discussion, the Court will assume that plaintiff Leonard is not presently qualified as a candidate for Governor.

Plaintiffs claim that it is constitutionally impermissible to deny a citizen who is over 18 years of age elective office simply because he has not reached the age of 30 years. Plaintiffs contend that such invidious discrimination against otherwise qualified citizens cannot be justified by any compelling state interest and thus denies those persons between the ages of 18 and 30 the equal protection of the laws, as well as First Amendment freedoms of association, petition, and speech.

The only case in point which we have been able to find supports plaintiffs' position. In *Manson v. Edwards*,²⁵ a Michigan city charter provision requiring all candidates for the Detroit City Council to be at least 25 years of age was tested by the compelling interest standard and held violative of Equal Protection. The Court reasoned that the rejection of candidates less than 25 years old also denied some citizens the opportunity to vote for the candidate of their choice in violation of First Amendment freedoms. The City made no showing that the knowledge or wisdom arguably necessary to fulfill the duties of the Councilman are absent in all or most persons between the ages of 18 and 24.

We respectfully decline to follow the *Manson* decision. We

²⁵ No. 38325, 41 U.S.L.W. 2055-56 (E.D. Mich., July 17, 1972).

find that the state has an interest, whether compelling or otherwise³⁶ in having a minimum maturity in voters and in having an informed electorate. The Supreme Court recognized prior to the adoption of the 26th Amendment to the United States Constitution that a state could constitutionally establish a minimum age for its voters.³⁷ There is no question that Congress could do so in national elections as well.³⁸ As the Court recently observed in *Bullock v. Carter*, *supra*, "the rights of voters and the rights of candidates do not lend themselves to neat separation"³⁹ Therefore this Court will not extend the Equal Protection Clause to nullify the states' powers over election requirements for candidates where they once had the Constitutional power to prescribe such regulations for voters. The Framers of the United States Constitution saw the wisdom in establishing minimum age requirements for President, Vice-President, and Members of Congress.⁴⁰ Until the Supreme Court holds otherwise, this Court has reached the "formidable 'Stop' sign" referred to by Mr. Justice Harlan in *Oregon v. Mitchell*, 400 U.S. at 152, through which we will not run. Accordingly, the injunctive relief sought by plaintiffs Leonard and Alewitz to enjoin defendant from refusing to place their names on the general election ballot for failure to comply with the age requirement of Article IV, §§ 4 & 16 of the Texas Constitution is denied.

VI.

Several of the plaintiffs allege that the Texas Election Code is invidiously discriminatory because it does not provide absentee balloting for minority and independent candidates

³⁶ See the discussion on the propriety of using the compelling interest standard in reviewing a state's right to establish minimum age requirements in *Oregon v. Mitchell*, 400 U.S. 112, 294 (1970) (Stewart, J., concurring and dissenting); *Gaunt v. Brown*, 341 F.Supp. 1187, 1190-92 (S.D. Ohio 1972).

³⁷ See, e.g., *Oregon v. Mitchell*, *supra*; *Kramer v. Union Free School District*, 395 U.S. 621, 625 (1969); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 51 (1959); cf. *Carrington v. Rash*, 380 U.S. 89 (1964); *Pope v. Williams*, 193 U.S. 621 (1904).

³⁸ *Oregon v. Mitchell*, *supra*.

³⁹ 405 U.S. at 143.

⁴⁰ U.S. Const. art. I, § 2 [Representatives], § 3 [Senators]; Art. II § 1 [President]; Amend. 12 [Vice-President].

while it does allow absentee ballots to be cast for candidates of majority parties. We find plaintiffs' contentions to be without merit.

The Supreme Court in *McDonald v. Board of Elections*⁴¹ held that the traditional rational basis standard rather than the more exacting compelling interest test should be used in evaluating classifications involving absentee ballot provisions. Although the State of Texas does not offer any reasons for the lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."⁴²

Conceivably, Texas has a rational basis in refusing to expend the time, money, and effort required to print and distribute absentee ballots at state expense for minority parties.⁴³ The different treatment accorded minority and majority parties in Texas is not arbitrary and invidious discrimination totally unrelated to the object of the legislation.⁴⁴ In *McDonald* the Court treated absentee ballot legislation as remedial legislation designed to extend the franchise to those who had previously been unable to exercise it. But the Court stated that such legislation should not be invalidated merely because the legislature failed to cover all classes of persons who might benefit from it.⁴⁵

VII.

Plaintiff Laural N. Dunn, independent candidate for the United States House of Representatives, represents himself and several other independent candidates in their challenges of article 13.50 of the Texas Election Code, which sets out

⁴¹ 394 U.S. 802, 807 (1969).

⁴² *Id.* at 809.

⁴³ See *Fidell v. Board of Elections*, 343 F.Supp. 913, 915 (E.D. N.Y. 1972).

⁴⁴ See *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Smith v. Cahoon*, 283 U.S. 553, 567 (1931).

⁴⁵ *McDonald v. Board of Elections*, 394 U.S. at 809, 811.

the requirements independent candidates must meet in order to get on the general election ballot.⁴⁶ The other plaintiffs represented by Dunn are two independent candidates for the Texas House of Representatives, one independent candidate for the Texas Senate, and one independent candidate for county commissioner of McClennan County, Texas.

Other than a general allegation that the requirements of article 13.50 are "unduly burdensome" as to them, plaintiffs present absolutely no factual basis in support of their claims. We reject outright plaintiffs argument that states can impose no additional election requirements other than those found in the United States Constitution.⁴⁷ Plaintiffs admitted in oral argument that they did not attempt in any way to comply with the provisions of article 13.50. Since *inability*, rather than *unwillingness*, to comply is crucial here,⁴⁸ there is some basis for holding that these plaintiffs lack standing to challenge the requirements of the Texas Election Code. Nevertheless, we conclude for the same reason stated in Part III of this opinion that the requirements of article 13.50 serve a compelling state interest and do not operate to suffocate the election process. Nor are they violative of Equal Protection. The totality of the scheme imposed upon independent candidates is even less burdensome than that required of political parties. For these reasons we hold article 13.50 constitutional and deny relief to plaintiffs.

VIII.

The American Party of Texas challenges the constitutionality of the McKool-Stroud Primary Financing Law of 1972.⁴⁹

⁴⁶ Article 13.50 (which is set out in Appendix "C") constitutes the major focal point of attack by these plaintiffs. However, they also challenge article 13.09(b), prohibiting write-in balloting in Texas; article 13.11a, prohibiting any person who has participated in a party primary or convention from being placed on the ballot as an independent candidate; and article 13.11, requiring a uniform primary test.

Because the plaintiffs have failed to allege or show that they were denied access to the ballot through the operation of any of these statutes, the issues presented are not properly before this Court and are not decided.

⁴⁷ See *Bullock v. Carter*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. at 442; *Williams v. Rhodes*, 393 U.S. at 32.

⁴⁸ *Bullock v. Carter*, 405 U.S. at 146.

⁴⁹ Tex. Laws, 2nd Spec. Sess., ch. 2, § 1, at 7 [set out in Appendix "B"].

The pleadings allege, not only violations of the Due Process and Equal Protection Clauses of the United States Constitution, but a myriad of State Constitutional violations as well. We decline pendent jurisdiction of the State Constitutional issues.⁵⁰ Furthermore, we find plaintiffs' allegations bottomed upon the Constitution of the United States to be without merit.

The McKool-Stroud Act was passed to provide financing for party primaries after the Supreme Court held the Texas filing fee requirements unconstitutional in *Bullock v. Carter*.⁵¹ The Act provides that the State of Texas will finance the primary elections of only those political parties casting 200,000 or more votes for governor in the last preceding general election. Thus on its face, the Act excludes any payment of state funds to minority political parties.

The state supports the validity of the Act by arguing that only those major parties required to hold primary elections by article 13.02 of the Texas Election Code incur the large expense entailed in conducting a party primary election. The convention and petition procedure available for small or new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries. There exists no need for expenditures of state funds for political groups which may have little if any voter support. If, however, minority parties reach a size where they are forced to conduct party primary elections, they will, in turn, be the recipients of the State's financial assistance. Such an arrangement is constitutionally permissible.⁵²

⁵⁰ See *United States Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ["It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."] Although the American Party claims to have applied for mandamus against enforcement of the McKool-Stroud law in the Texas Supreme Court on May 3, 1972 which was summarily refused thus "exhausting" state remedies, this Court should not and does not have to concern itself with the interpretation of the Texas Constitution—a task through comity better left to state courts.

⁵¹ 405 U.S. 134 (1972), *aff'd*, *Carter v. Dies*, 321 F.Supp. 1358 (N.D. Tex. 1970).

⁵² [A]ny political body that wins as much as 20% support at an election becomes a "political party" with its attendant ballot position rights and primary election obligations, and any "political party" whose support at the polls falls below that figure reverts to the status of a "political body" with its attendant nominating petition responsibilities and freedom from primary election duties. We can find in this system nothing

Finally, the State of Texas specifically raised the possibility of just the type of attack here presented before the Supreme Court in *Bullock v. Carter*. In answering the State's contention, the Court stated:

[T]he Court has recently upheld the validity of a state law distinguishing between political parties on the basis of success in prior elections. *Jenness v. Fortson, supra*. We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purposes of financing primaries.⁵³

The only conclusion that can be drawn from the Court's statement is that they anticipated that only those political parties required to engage in the expensive primary elections would receive State financial aid. This Court will not invalidate the Texas Legislature's reasonable attempt to comply with that directive.

In sum, this Court finds that the Texas Election Code is not comprised of "an entangling web of election laws" of the type referred to by Mr. Justice Douglas and invalidated in

that abridges the rights of free speech and association secured by the First and Fourteenth Amendments.

... The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

... [W]e can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizational paraphernalia required of a "political party" as a condition for conducting a primary election.

... [T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes, supra*.

403 U.S. at 439-42 (emphasis supplied) (footnotes omitted).

⁵³ 405 U.S. at 147.

Williams v. Rhodes, 393 U.S. at 35. Obviously, it does not operate to "freeze the status quo" since two minority parties have qualified and been certified to the ballot in Texas. Compare *Jenness v. Fortson*, 403 at 431. After close scrutiny, this Court cannot say that, in serving its compelling interests, Texas has chosen the way of greater interference in establishing alternative routes to the ballot. *Dunn v. Blumstein*, 405 U.S. at 343.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That articles 1.05, 13.11a, 13.45(2), 13.47a, and 13.50 of the Texas Election Code; the minimum age requirement of Article IV, §§ 4 & 16 of the Texas Constitution; and the McKool-Stroud Primary Financing Law of 1972 are not violative of the First and Fourteenth Amendments to the United States Constitution. Therefore all relief requested by plaintiffs is denied and the complaints are dismissed.

2. That the temporary restraining order heretofore entered extending the time to gather signatures on nominating petitions from June 30, 1972 to September 1, 1972 is hereby dissolved. All signatures obtained during this period are null and void.

3. That all motions not heretofore acted upon by this Court are hereby denied.

An appropriate order will enter accordingly.

Entered this 15th day of September, 1972, at San Antonio, Texas.

HOMER THORNBERRY, Circuit Judge
D. W. SUTTLE, District Judge
JOHN H. WOOD, JR., District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RAZA UNIDA PARTY, ET AL

v.

SA-72-CA-158

BOB BULLOCK, SECRETARY OF
STATE OF TEXAS

AMERICAN PARTY OF TEXAS, ET AL

v.

MO-72-CA-50

BOB BULLOCK

LAURAL DUNN, ET AL

v.

W-72-CA-37

BOB BULLOCK, ET AL

TEXAS NEW PARTY and

SOCIALIST WORKERS PARTY,
ET AL

v.

CA-72-H-990

PRESTON SMITH, GOVERNOR OF
TEXAS and BOB BULLOCK

Judgment

This action came on for hearing before a three-judge Court, Honorable Homer Thornberry, Circuit Judge, and Honorable D. W. Suttle, and Honorable John H. Wood, Jr. presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED and DECREED:

1. That articles 1.05, 13.11a, 13.45(2), 13.47a, and 13.50 of the Texas Election Code; the minimum age requirement of Article IV, §§ 4 & 16 of the Texas Constitution, and the McKool-Stroud Primary Financing Law of 1972 are not violative of the First and Fourteenth Amendments to the United

States Constitution. Therefore, all relief requested by plaintiffs is denied and the complaints are dismissed.

2. That the temporary restraining order heretofore entered extending the time to gather signatures on nominating petitions from June 30, 1972 to September 1, 1972 is hereby dissolved. All signatures obtained during this period are null and void.

3. That all motions not heretofore acted upon by this Court are hereby denied.

Entered this 15th day of September, 1972.

HOMER THORNBERRY, Circuit Judge

D. W. SUTTLE, District Judge

JOHN H. WOOD, JR., District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**THE AMERICAN PARTY
OF TEXAS,
et al,**

Petitioners,

Civil No.

V.

**MO-72-CA-50
(Consolidated)**

**HONORABLE BOB BULLOCK,
Secretary of State of Texas,
Defendant.**

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that THE AMERICAN PARTY OF TEXAS, the Plaintiff above named, hereby Appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on September 15, 1972.

This Appeal is taken pursuant to 28 U.S.C. 1253.

**GLORIA T. SVANAS
418 West Fourth Street
Odessa, Texas 79761**

Attorney for THE AMERICAN PARTY OF TEXAS

Certificate of Service

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing notice of Appeal has this the 16th day of September, 1972, been placed in the United States Mails, Air Mail, postage prepaid and addressed as follows: Mr. Pat Maloney, 1000 Alamo National Building, San Antonio, Texas 78205; Mr. Stuart M. Nelkin, 4635 Southwest Freeway, Suite 720 West, Houston, Texas 77027; Mr. Pat Bailey, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin,

Texas, 78711; Mr. Edward Mallett, 618 Prairie Street, No. 3, Houston, Texas 77002; Mr. Mario Obledo and Mr. Alfred H. Sigman, 145 Ninth Street, San Francisco, California 94103 and Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76706.

GLORIA T. SVANAS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DUNN, ET AL.,
Petitioner

VS.

NO. W-72-CA-37

BULLOCK, ET AL.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that LAUREL N. DUNN, the plaintiff above named, hereby Appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on September 15, 1972.

This Appeal is taken pursuant to 28 U.S.C. 1253.

LAUREL N. DUNN
2811 Old Robinson Road
Waco, Texas 67606

Certificate of Service

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing notice of Appeal has this the 27th day of September, 1972, been placed in the United States Mails, Air Mail, postage prepaid and addressed as follows: Mr. Pat Maloney, 1000 Alamo National Building, San Antonio, Texas 78205; Mr. Stuart M. Nelkin, 4635 Southwest Freeway, Suite 720 West, Houston, Texas 77027; Mr. Pat Bailey, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711; Mr. Edward Mallet, 618 Prairie Street, No. 3, Houston, Texas 78711; Mr. Edward Mallet, 618 Prairie Street, No. 3, Houston, Texas 77002; Mr. Mario Obledo and Mr. Alfred H. Sigman, 145 Ninth Street, San Francisco, California 94103, and Gloria T. Svanas, 418 West Fourth Street, Odessa, Texas 79761; Office of The Clerk, Supreme Court of the United States, Washington, D.C. 20543.

LAUREL N. DUNN

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON, DIVISION

TEXAS NEW PARTY, TEXAS
SOCIALIST WORKERS PARTY,
DEBBY LEONARD, MEYER
ALEWITZ, KEN GJENMRE,
BENTON S. RUSSELL, III, BOBBY
CALDWELL, DAVID HALE,
RICHARD GARCIA, ELIZABETH
COX and JAMES DAMON

Individually and on behalf of all
other persons similarly situated,

PLAINTIFFS

CIVIL ACTION
NO. 72-H-990

VS.

PRESTON SMITH, Individually and
as Governor of the State of Texas
and BOB BULLOCK, Individually
and as Secretary of the State of Texas

DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Texas New Party, Texas Socialist Workers Party, Debby Leonard, Meyer Alewitz, Ken Gjenmre, Benton S. Russell, III, Bobby Caldwell, David Hale, Richard Garcia, Elizabeth Cox and James Damon, the Plaintiffs in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on September 15, 1972.

This appeal is taken pursuant to 28 U.S.C. 1253.

MICHAEL ANTHONY MANESS
410 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
Attorney for Plaintiffs

Certificate of Service

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing Notice of Appeal has this the 17th day of October, 1972, been placed in the United States Mails, Air Mail, postage prepaid and addressed as follows: Mr. Pat Maloney, 1000 Alamo National Building, San Antonio, Texas 78205; Mr. Stuart M. Nelkin, 4635 Southwest Freeway, Suite 720 West, Houston, Texas 77027; Mr. Pat Bailey, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711; Mr. Mario Obledo and Mr. Alfred H. Sigman, 145 Ninth Street, San Francisco, California 94103; and Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76706.

MICHAEL ANTHONY MANESS

APPENDIX D

Art .13.12 Application for place on ballot; filing; deadline; extension; withdrawal; notice

The application to have the name of any person affiliating with any party placed on the official ballot for a general primary as a candidate for the nomination of such party for any office for which a nomination may be made at such primary shall be governed by the following.

* * * * *

2. The application shall be filed with the state chairman in the case if statewide offices, with the county chairman of each county which is included wholly or partially within the district in the case of district offices, and with the county chairman of the particular county in the case of county and precinct offices; provided, however, that applications of candidates for justice of the court of civil appeals shall be filed with the state chairman. Except as provided in Paragraph 2a of this section, the application shall be filed not later than 6 p.m. on the first Monday in February preceding such primary.

Subsec. 2 amended by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967; Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

2a. The filing deadline stated in Paragraph 2 of this section shall be extended for the particular party primary and office involved, as provided in this paragraph: (i) if between the fifth day preceding the first Monday in February and the 30th day preceding the general primary, both dates included, any candidate for an office dies, if the candidate had complied with all prerequisites for having his name placed on the ballot which he was required to perform by the date of his death; (ii) if between the first Monday in February and the 30th day preceding the general primary, both dates included, any candidate who is seeking nomination to an office which he then holds withdraws or is declared ineligible for election to that office; or (iii) if between the first Monday in February and the 30th day preceding the general primary, both dates included, the only candidate who has filed for a particular office in the primary of that party withdraws or is

declared ineligible. In the enumerated circumstances, the name of the deceased, withdrawn, or ineligible candidate shall not be printed on the ballot, and applications for that party's nomination for that office may be filed not later than 6 p.m. on the 15th day following the death, withdrawal, or declaration of ineligibility of the candidate; provided, however, that where the death, withdrawal, or declaration of ineligibility occurs less than 15 days before the 25th day preceding the primary, the deadline for filing shall be 6 p.m. on the 20th day preceding the primary. Notwithstanding the provisions of Paragraph 2b of this section, an application which is not received by the chairman until after 6 p.m. on the 25th day shall not be timely, and applications mailed but not actually received by that time shall not be accepted for filing. Further, notwithstanding the provisions of Section 186¹ or any other provision of this code, the full amount of the assessment or filing fee must be received by the chairman not later than 6 p.m. on the 25th day.

Subsec. 2a added by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967. Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

2b. Except as otherwise provided in Paragraph 2a, an application filed under either Paragraph 2 or Paragraph 2a of this section shall be considered filed if sent to the proper chairman at his post-office address by registered or certified mail from any point in this state not later than the day before the filing deadline, as shown by the postmark. Any application not received the filing deadline, as shown by the postmark. Any application not received by the chairman before the deadline does not comply with this law unless it has been mailed by registered or certified mail as herein provided, and it shall not be sufficient to send the application by any other type of mail unless it is delivered before the deadline.

2c. A candidate may withdraw by filing with the chairman or chairmen with whom his application was filed, a signed request, duly acknowledged by him, that his name not be printed on the primary ballot. Whenever a filing period is extended by the death, withdrawal, or ineligibility of a candidate, each county chairman with whom the candidate's ap-

¹ Article 13.08.

plication was filed shall give notice of the opening of the filing and of the deadline to file by mailing or delivering a news release within 48 hours after his first knowledge of the death, withdrawal, or ineligibility, to each newspaper, as defined in Article 28a, Vernon's Texas Civil Statutes, as amended, which is published in the county. Where the application was filed with the state chairman, he shall give notice in like manner by mailing or delivering the release to at least three daily newspapers which maintain news representatives in the State Capitol. The failure of a county chairman or state chairman to comply with this requirement shall be ground for his removal from office by the committee of which he is chairman.

2d. A candidate shall not be permitted to withdraw during the period of 20 days preceding the general primary. If after the 30th day preceding the general primary a candidate dies or an incumbent or an unopposed candidate withdraws or is declared ineligible, the procedure detailed in Section 104 of this code¹ shall be followed. Except as provided in that section, the name of a deceased, withdrawn, or ineligible candidate shall not be printed on the ballot.

Subsecs. 2b-2d added by Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

3. Within ten days after the first Monday in February, the state chairman shall file with the Secretary of State, and each county chairman shall file with the county clerk of his county a list of the names of all candidates, arranged by office for which nomination is sought, whose applications have been timely received. In like manner each chairman shall file, within three days after any extended filing deadline under Paragraph 2a of this section, a supplemental list of candidates whose applications were timely received after the original list was prepared. Each county chairman shall forward to the chairman of the state executive committee a copy of each list which he files with the county clerk.

Subsec. 3 amended by Acts 1967, 60th Leg., p. 1913, ch. 723, § 45, eff. Aug. 28, 1967.

Art. 13.45 Nominations by parties under two hundred thousand votes

¹ Article 8.22.

Subdivision 1. Parties receiving more than two percent of vote for governor. Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in Sections 224 and 225 of this code.¹

Subdivision 2. Parties receiving less than two percent of vote for governor. Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in Sections 224 and 225,¹ but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with Sections 222a and 224 of this code,² signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election. The ad-

¹ Articles 13.47 and 13.48.

² Articles 13.47 and 13.48.

³ Articles 13.45a and 13.47.

dress and registration certificate number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: "I know the contents of the foregoing petition, requesting that the names of the nominees of the _____ Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party." The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by Section 181 of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than \$100 or more than \$500.

The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

At the time the secretary of state makes his certifications to the county clerks as provided in Section 3 of this code,^{*} he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements."

Amended by Acts 1967, 60th Leg., p. 1921, ch. 723, § 59, eff. Aug. 28, 1967. Subd. 2 amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 35, eff. Sept. 1, 1969.

^{*} Article 1.03.

Art. 13.47 Conventions of parties not required to hold primary

Political parties which are not required by law to make nominations by primary election may make nominations by conventions as provided herein.

Nominations for statewide offices shall be made at a state convention, which shall be held on the second Saturday in June of the election year, and which shall be composed of delegates selected in the various counties at county conventions held on the second Saturday in May. The county conventions shall be composed of delegates from the general election precincts of such counties elected therein at precinct conventions held in such precincts on the first Saturday in May.

Nominations for district offices of districts composed of more than one county or part thereof shall be made at district conventions held on the third Saturday in May of the election year, composed of delegates elected thereto from the counties having territory within the district, at the county conventions held on the second Saturday in May.

Nominations for county and precinct offices and for district offices of districts composed of only one county or part of one county shall be made at the county conventions held on the second Saturday in May.

The state executive committee of each party shall determine the formula by which the number of delegates to the county, district, and state conventions of that party shall be governed, and shall also formulate such rules as it deems desirable with respect to participation of delegates at a county convention in the nomination of candidates for precinct offices and for district offices of districts composed of only a part of the county, and in the election of delegates to a district convention where only a part of the county is included in the district.

Amended by Acts 1967, 60th Leg., p. 1923, ch. 723, § 61, eff. Aug. 28, 1967.

Art. 13.50 Non-partisan and independent candidates

The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided,

and delivered to him within thirty days after the second primary election day, as follows:

If for an office to be voted for throughout the state, the application shall be signed by one percent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the last preceding general election, and shall be addressed to the county judge.

Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

No application shall contain the name of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election.

The application shall contain the following information with respect to each person signing it: his address and the number

of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 227; as amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 104.

Art. 13.08c—1. Primary financing law of 1972

Section 1. *Purpose.* The invalidation by federal court decisions of the statutory method of financing primary elections in this State necessitates legislative action to provide a solution to the impasse facing political parties which cast more than 200,000 votes for Governor in the last preceding general election, in that the existing law requires that their nominations for the general election be made in primary elections but they are left without adequate means to finance the primaries. The purpose of this Act is to provide a temporary solution to the impasses by enacting provisions relating to the conduct and financing of primary elections for the year 1972.

Sec. 1-A. *Short Title.* This Act may be cited as the McKool-Stroud Primary Financing Law of 1972.

Sec. 2. *Conduct of the Primary Elections.* Nominations for the general election to be held on November 7, 1972, shall be made in the manner provided in the Texas Election Code. The primary elections held by a political party pursuant to Sections 180 and 181, Texas Election Code (Articles 13.02 and 13.03, Vernon's Texas Election Code), shall be conducted through the party's state executive committee and county executive committees in accordance with the procedures detailed in the Election Code, with the following modifications and clarifications:

(1) In order for a candidate to have his name placed on the ballot for the general primary election, he must have either paid a filing fee or filed a nominating petition in compliance with the directives issued by the Secretary of State following the decision in *Johnston v. Bullock, et al.*, CA 3-5373-C, United States District Court for the Northern District of Texas, Dallas Division,¹ which declared the statutory system of fees and assessments to be invalid.

(2) The fees paid to the county chairman pursuant to the directives of the Secretary of State and any contributions made to the county chairman or the county executive committee for the specific purpose of helping defray the costs of the primary elections shall be deposited to the credit of the primary fund referred to in Section 196 (Article 13.18) of the Election Code and shall be applied to payment of the costs of the primary elections. The county chairman and the committee may also use any other available funds toward defraying the costs. The remaining costs incurred after the effective date of this Act shall be borne by the State out of the appropriation made for that purpose in Section 4 of this Act, in accordance with the procedures outlined in Section 3 of this Act, or out of supplemental appropriations made at subsequent sessions of the Legislature if the original appropriation is insufficient.

(3) In each county in which voting machines or an electronic voting system has been adopted, the county Commissioners Court shall permit the county-owned voting machines or voting equipment to be used for the primary elections, including the conduct of absentee voting for the elections, at a charge for use at each election not exceeding \$16 per unit for voting machines adopted under Section 79 of the Election Code,² and not exceeding \$3 per unit for voting equipment adopted under Section 80 of the Election Code.³ The maximum amount fixed in this Act includes the lease price for use of the unit, and also the charge for its preparation and maintenance if the county provides these services. The county is entitled to reimbursement for the cost of transporting the machines

¹ See *Johnston v. Luna* (D.C. 1972) 338 F.Supp. 355.

² Article 7.14.

³ Article 7.15.

or equipment to and from the polling places if the county provides this service. Where voting is by an electronic voting system, the county may not charge for use of county-owned automatic tabulating equipment at the central counting station, but all actual expenditures incidental to operation of the central counting station in counting the ballots are payable out of the primary fund.

(4) All expenses of the county clerk in conducting absentee voting in the primary elections, including the employment of additional deputies where necessary, shall be paid by the county. A county is not entitled to reimbursement for any expenditure of county funds in connection with the conduct of absentee voting or any other services rendered by the county clerk in the primary elections, except for voting machines and/or punchcard units used in conducting the absentee voting.

(5) The total combined compensation paid to the county chairman and the secretary of the county executive committee (where the committee has named a secretary) and to any office personnel employed to assist in the performance of the duties placed upon the chairman, the secretary, and the members of the county executive committee shall not exceed five percent of the amount actually spent in holding the primary elections for the year, exclusive of the compensation paid to these officers and employees.

(6) Charges for office expenses shall not be allowed for a period extending beyond the 10th day after the date of the last primary held by the party.

(7) The Secretary of State is authorized to promulgate uniform rules in regard to the maximum number of election clerks who may be compensated for their services at a polling place, taking into account the number of registered voters in the election precinct, the number of votes cast in the precinct in the party's primary elections in 1970, the method of voting, and other relevant factors. The Secretary of State must allow compensation for the presiding judge, alternate judge, and at least one clerk for each precinct. If the Secretary of State promulgate rules on this subject, he shall furnish a copy of the rules to each county chairman at least 10 days before the election to which the rules apply. The Secretary of State may allow compensation for clerks employed in excess of the appli-

cable limit set by the rules if he finds that employment of additional clerks was justified by special circumstances existing in the precinct.

(8) The county chairman is not required to file the financial report provided for in Subdivision 5 of Section 196 (Article 13.18) of the Election Code, but he shall account for the primary fund in the manner provided in Section 3 of this Act.

(9) The Secretary of State shall not approve any expenditure of state funds to any county organization that practices discrimination based on race, sex, age, creed, or national origin. The State Attorney General shall be specifically responsible for the enforcement of this section.

Sec. 3. State Financing. (a) As soon as possible after this Act takes effect, the Secretary of State shall obtain from each county chairman of each political party in the state which is holding primary elections in 1972 a sworn itemized estimate of the costs for conducting the first primary election in his county, showing the costs incurred or to be incurred after the effective date, together with a sworn statement of the filing fees and contributions received by the chairman, for such primary election to and including the date of such sworn statement. The Secretary of State shall review the estimate and shall notify the chairman of any items which he has disallowed as unauthorized expenditures. Expenditures may be allowed only for those purposes which are properly payable out of the primary fund under existing law as established by the statutes and court decisions of this State. The Secretary of State shall subtract from the approved estimated any amount of the fees and contributions received by the chairman remaining over and above legitimate expenses incurred, before the effective date of this Act, for the conduct and financing of the Primary Elections for the year 1972, and shall certify to the Comptroller of Public Accounts the net estimated amount which is payable out of State funds, together with the Secretary of State's calculation of three-fourths of that amount. The Comptroller forthwith shall issue a warrant to the chairman for three-fourths of the certified amount.

(b) In each county in which a runoff primary is necessary, within 10 days after the first primary the county chairman shall submit to the Secretary of State a sworn itemized estimate of the costs of the runoff primary incurred or to be

incurred after the effective date of this Act. As in the case of the first primary, the Secretary of State shall notify the chairman of items which he disallows, and shall certify to the Comptroller the approved estimated amount which is payable out of State funds, together with the Secretary of State's calculation of three-fourths of that amount; and the Comptroller shall issue a warrant to the chairman for three-fourths of the certified amount.

(c) Within 20 days after the date of the runoff primary, the county chairman shall submit to the Secretary of State a sworn itemized report of the actual costs, filing fees collected and contributions received, of the primary election or elections (as the case may be) held by his party in his county, showing the costs incurred before the effective date of this Act separately from those incurred after the effective date. If the actual expenditure for an item exceeded the estimated amount, the chairman shall submit an explanation of the reason for the increased expenditure, and the Secretary of State shall allow the increase if good cause is shown. The Secretary of State shall certify to the Comptroller the difference between the total amount payable out of State funds and the amount which has already been transmitted to the chairman, and the Comptroller shall issue a warrant to the chairman in the amount certified. If the total amount of the fees and contributions in excess of those previously expended for expenses which would have been payable if incurred after the effective date of this Act, and the payments from the State exceeds the actual expenditures incurred after the effective date of this Act, the chairman shall refund the difference to the State, in the form of a check made payable to the Secretary of State. The Secretary of State shall deposit the check in the State Treasury to the credit of the appropriation account established under Subsection (a) of Section 4 of this Act.

(d) Each county chairman shall deposit to the credit of the primary fund all warrants received by him under this section. Expenses incurred by or on behalf of the county executive committee for the conduct of the primary elections shall be paid from the primary fund, in the manner authorized by the committee.

(e) The county chairman is responsible for payment of claims for primary election expenses, and the State is not

liable to any claimant for failure of the county chairman to pay a claim.

(f) The Secretary of State shall prescribe and shall furnish to the county chairmen the forms which they are to use in submitting their statements and reports to him.

(g) Wherever the word "county chairman" is used in this Act, it shall apply to the county chairman or his successor in office, and such county chairman shall not be personally liable except for the misapplication of funds.

(h) In any case in which the Secretary of State disallows an item of expenditure under Subsection (a) or (b) of this section, or refuses to allow an increase under Subsection (c) of this section, the county chairman may appeal to a district court of Travis county by filing a petition within 20 days after the date the notification is received from the Secretary of State, and the district court shall allow such expenditures as are properly payable out of the primary fund under existing law. Any item not certified to the comptroller of public accounts for payment within 10 days after its submission to the Secretary of State may be considered disallowed for this purpose. Judicial review shall be by trial de novo as are appeals from the justice court to the county court.

Sec. 4. Appropriations. (a) There is appropriated from the general revenue fund to the office of the Secretary of State the sum of \$2,150,000 for the purpose of making payments to county chairmen as provided in Sections 2 and 3 of this Act. All refunds deposited to the credit of this appropriation account are appropriated for the same purpose as designated for the original appropriation.

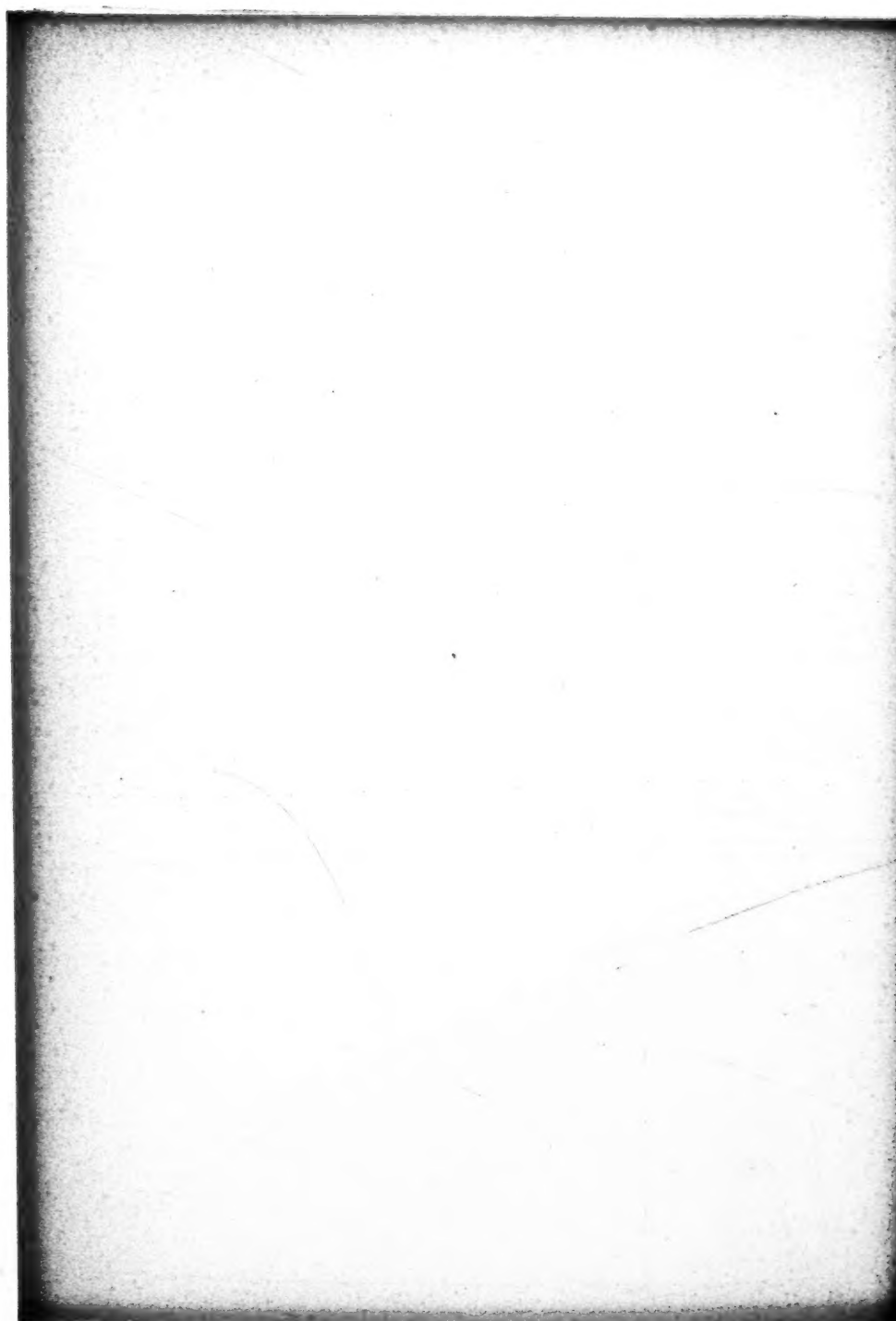
(b) To enable the Secretary of State to finance the additional duties which this Act places upon him, there is appropriated from the general revenue fund to the office of the Secretary of State the sum of \$20,000, which shall be placed to the credit of the appropriation accounts established under Items 6 and 8 of the appropriation made by Chapter 1047, Acts of the 62nd Legislature, Regular Session, 1971, to the office of the Secretary of State for the fiscal year ending August 31, 1972, in the following amounts:

Item 6 (seasonal and part-time help) \$ 6,000

Item 8 (consumable supplies and materials,
current and recurring operating
expense, etc.) 14,000

Sec. 4-A. Severability. If any provision of this Act or the applicable thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Acts 1972, 62nd Leg., 2nd C.S., p. ____, ch. 2, §§ 1 to 4-A, eff. April 4, 1972.



72 - 942

DEC 30 1972

NO. _____

IN THE
Supreme Court of the United States
October Term, 1972

ROBERT HAINSWORTH, *Appellant*

v.

BOB BULLOCK, SECRETARY OF STATE OF TEXAS,
Appellee

On Appeal From The United States District Court
For The Western District of Texas

JURISDICTIONAL STATEMENT

ROBERT W. HAINSWORTH
Counsel for Appellant
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

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NO. _____

IN THE
Supreme Court of the United States
October Term, 1972

ROBERT HAINSWORTH, *Appellant*

v.

BOB BULLOCK, SECRETARY OF STATE OF TEXAS,
Appellee

On Appeal From The United States District Court
For The Western District of Texas

JURISDICTIONAL STATEMENT

To The Honorable Supreme Court:

Appellant appeals from the Final Order of the United States District Court for the Western District of Texas, and submits this Jurisdictional Statement.

Reference To Opinions Below

It appears that the opinions of the Court below have not yet been officially reported.

Statement Of Grounds For Jurisdiction

This was a proceeding for injunctive relief, challenging the constitutionality of a State statute as being repugnant to Amendment XIV, Section 1, of the Constitution of the United States, in its requirements for an independent candidate to obtain ballot position and that the Court enjoin and restrain the enforcement of Art. 13.50 V.A. T.S., by the Secretary of State of Texas, as it pertains to a nonpartisan or independent candidate for a district office in a district composed of only part of one county, being required to have his application signed by 5 per cent of the entire vote cast for Governor in such district at the last preceding general election, but not to exceed five hundred in number.

This suit was brought under 28 U.S.C. 1343 (3).

The Memorandum Order and Judgment of the United States District Court was dated and entered on the 19th day of September, 1972. Time of entry not known. The Order Denying Motion For Rehearing was dated the 3rd day of October, 1972, and was entered on the 3rd day of October, 1972. The Notice of Appeal was filed on November 2, 1972, in the United States District Court for the Western District of Texas, Austin Division.

The statutory provisions believed to confer on the Court jurisdiction of the appeal is Title 28, U.S.C.A., Sections 1253, 2281, and 2101 (b).

Cases believed to sustain the jurisdiction are: *Idle-Wild Bon Voyage Liquor Corp. v. Epstein, et al*, 1962 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 734; *Stratton v. St. Louis Southern Ry. Co.*, 1930, 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135.

Text Of State Statute Set Out**Art. 13.50 Non-partisan and independent candidates**

The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the last preceding general election, and shall be addressed to the county judge.

Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election.

The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to an officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 227; as amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 104.

Question Presented By Appeal

Whether Art. 13.50, Texas Election Code, V.A.T.S. violates the Constitution of the United States, Section 1, Amendment XIV, in its provisions and requirements for an independent candidate to get name on general election ballot?

Statement Of The Case

Appellant, a native citizen of the United States and of the State of Texas, and a citizen of Harris County, Texas, sought to become an independent candidate for the office of State Representative, District 86, in the November general election. Appellant complied with all requirements of the Texas Election Code, V.A.T.S., to get his name on the ballot as an independent candidate for the office of State Representative, District 86, in the November 7, 1972 general election except that appellant did not have or obtain as required by State statute, signatures of qualified voters, totaling 5 per cent of the entire vote cast for Governors in such district at the last preceding general election, or five hundred signatures of qualified voters in such district.

Each signer of the application must be a registered voter and the number of his registration certificate must be shown on the application, and each signer of the application must subscribe to an oath before a Notary Public, which states in part that the signer has not participated in the general primary election or the runoff primary election during that year which has nominated at either such election a candidate for the office which I desire (the name of such independent candidate) to be a candidate.

That the appellant and any others seeking to become an independent candidate was not and are not allowed by the State of Texas to commence obtaining signatures to get name on ballot until after the runoff primary of the major parties, which was on June 3, 1972. Within 30 days after the runoff primary, the appellant and all others seeking to become an independent candidate must have obtained the necessary number of signatures to application, and turn in same in to the proper officer. While appellant did not obtain 500 signatures to his application or the required five per cent of the entire vote cast for Governor in the last preceding general election in the district, still the appellant did have over 300 signatures of qualified voters who had not voted in either the first primary or runoff primary election. On July 3, 1972, appellant requested the Secretary of State for additional time in which to obtain additional signatures to his application, but appellant was not granted an extension. Appellant left his application to get name on general election ballot with the office of the Secretary of State on July 3, 1972.

Reasons Why Questions Presented Is So Substantial

The State of Texas by V.A.T.S. Election Code, Art. 13.50, in establishing the requirements for a nonpartisan or independent candidate to get name on ballot, has denied and continues to deny to other citizens who seek to become a nonpartisan or independent candidate in a general election from a populous county like Harris County, the equal protection of the laws, and by such restrictive statutory requirements have been able in the past and are still able under the present statutory law to effectively prevent nonpartisan or independent candidates for the



State Legislature from getting such candidates name on the general election ballot. That the requirements of the Texas statute with respect to nonpartisan or independent candidates are so unduly restrictive and burdensome as to constitute infringements on the interests of individual voters in the total elective process, and the interests of the State of Texas are not sufficiently compelling to justify such infringements.

If the office sought is that of State Representative in a populous county like Harris County, which includes more than twenty State Representative Districts, with a State Representative district consisting of about 70,000 to 75,000 people; or if the office sought is that of United States Representative in a populous county like Harris, which includes 4 to 5 Congressional districts, with a Congressional district consisting of about 400,000 people or over, yet in both the State Representative district and in the Congressional district, the Texas statute requires that in order to get one's name on the ballot as a non-partisan or independent candidate, the number of signatures necessary is the same, 5 per cent of the entire vote cast for Governor in such district at the last preceding general election, but such number of signatures need not exceed 500.

In the case of *Linda Jeness et al, v. Ben W. Fortson, Secretary of State of Georgia*, 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970, it appears that a State meets all constitutional requirements with respect to statutes pertaining to independent candidates if the State statute allows:

1. A citizen desiring to become an independent candidate, to have name printed on ballot for the general elec-

tion if nominating petition is signed by at least 5 per cent of the number of registered voters at the last general election for the office in question;

2. The total time for circulating the petition is 180 days;

3. A voter may sign a petition even though he has signed others;

4. A person who has voted in a party primary election is fully eligible to sign a petition;

5. No signature on a nominating petition needs to be notarized;

6. The signer of a petition is not required to state that he intends to vote for that candidate at the election.

Too, it is respectfully submitted to the Court that this may be the first time that an appeal has been made to the Supreme Court of the United States, from a challenge made to the constitutionality of the Texas statute pertaining to nonpartisan or independent candidates getting name on the ballot for the State Legislature of Texas, for there is not known of any previous decisions of the Supreme Court of the United States pertaining to the constitutionality of V.A.T.S. Election Code, Art. 13.50, or any prior enacted similar Texas statute.

For the reasons stated above, and in order that fairer and better government for all in Texas may be strengthened and advanced, and in order that nonpartisan or independent candidates are provided an equal opportunity with the candidates of the major political parties in the State of Texas to make their appeal to the electorate and to have their political voices heard, it is respectfully sub-

mitted that the question presented is so substantial as to merit the consideration of the Court, and to require plenary consideration, with briefs on the merits and oral argument for resolution.

This appeal is not from a decree of a District Court granting or denying an interlocutory injunction.

Respectfully submitted,

Robert W. Hainsworth
Counsel for Appellant
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3710 Holman Avenue
Houston, Texas 77004

APPENDIX

UNITED STATES DISTRICT COURT
Western District of Texas—San Antonio Division

ROBERT W. HAINSWORTH

v.

BOB BULLOCK, Secretary of State

A-72-CA-111

MEMORANDUM ORDER AND JUDGMENT

Before THORNBERRY, Circuit Judge; SUTTLE, District Judge; and WOOD, District Judge.

PER CURIAM

Plaintiff is an independent candidate for the office of State Representative in District 86 of the State of Texas, who was denied a position on the general election ballot for failure to meet the requirements of the Texas Election Code, Tex. Rev. Civ. Stat. Ann. art. 13.50 (1967). Plaintiff challenges the Constitutionality of article 13.50 as violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and seeks to enjoin the Texas Secretary of State from enforcing the challenged enactment.

It is undisputed that plaintiff satisfies the necessary jurisdictional prerequisite pursuant to 28 U.S.C §2281 to require the convening of a three-judge court to determine the issues. This suit was filed too late to be consolidated with *Raza Unida Party, et al. v. Bob Bullock, et al.*,

No. SA-72-CA-158 (W.D. Tex., Sept. 15, 1972), decided by us today; nevertheless, this panel was designated to hear the case. For the same reasons stated by us in *Raza Unida Party, et al. v. Bob Bullock, et al.*, *supra*, this Court finds that article 13.50 serves a compelling state interest and is not violative of Equal Protection as applied to this plaintiff.

Accordingly, all relief sought by plaintiff is denied and the defendant's Motion, treated as one for summary judgment, is granted, and IT IS SO ORDERED.

Entered this 19th day of September, 1972.

A true copy of the original, I certify.

HOMER THORNBERRY
Homer Thornberry, Circuit Judge

D. W. SUTTLE
D. W. Suttle, District Judge

JOHN H. WOOD, JR.
John H. Wood, Jr., District Judge

By: Linda Peterson,
Deputy

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

SA-72-CA-158

RAZA UNIDA PARTY, ET AL

v.

**BOB BULLOCK, SECRETARY OF
STATE OF TEXAS**

MO-72-CA-50

AMERICAN PARTY OF TEXAS, ET AL

v.

BOB BULLOCK

W-72-CA-37

LAURAL DUNN, ET AL

v.

BOB BULLOCK, ET AL

CA-72-H-990

**TEXAS NEW PARTY AND SOCIALIST
WORKERS PARTY, ET AL**

v.

**PRESTON SMITH, GOVERNOR OF
TEXAS AND BOB BULLOCK**

MEMORANDUM OPINION

Before THORNBERRY, Circuit Judge; SUTTLE,
District Judge; and WOOD, District Judge

SUTTLE, District Judge

The various plaintiffs, comprised of minor political parties, their candidates for public office, qualified voters wishing to vote for candidates of these political parties, and individuals desiring to run for public office as independent candidates, bring class actions seeking to have this Court declare invalid certain provisions of the Texas Election Code, and related Texas election laws. They also seek to enjoin the Texas Secretary of State from enforcing the challenged enactments. The statutes involved are all statewide in their application, and their constitutionality is questioned on the basis that they violate the First and Fourteenth Amendments to the United States Constitution by infringing on the right of association, free speech, equal protection and due process.

* * *

III.

In order to have the names of its nominees printed on the general election ballot, a new or minority party must meet the following requirements of article 13.45(2):

* * *

4. The petition may not be circulated for signatures until after the date set for the holding of the major parties' primaries. Signatures must be certified to the Secretary of State's office.

* * *

This year minority parties had from May 6th until June 30th, or approximately 53 days, to gather signatures.

5. Each person who signs a petition must be administered an oath before a notary public at the time he signs.

Plaintiffs contend that these requirements, singly and in totality, impede the election process, the right of association guaranteed by the First Amendment, and are violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The State of Texas argues that it has a compelling interest in requiring some minimum amount of public support before placing a candidate's name on the ballot and in assuring that all candidates are in fact seeking elective office in good faith. The Court agrees that these are valid state objectives. A review of the decisions since *Williams v. Rhodes*, *supra*, leads this Court to conclude that the totality of the scheme required by article 13.45(2) is not constitutionally impermissible. The Supreme Court in *Jenness v. Fortson*, *supra*, balanced Georgia's "relatively high" 5% petition requirement against the absence of oppressive party organization requirements, voter cross-over prohibitions, or a restrictive petition circulating time period. Likewise, Texas' lenient 1% petition requirement must be balanced against its more burdensome party organization, circulation, and anti-raiding requirements.

* * *

Although any percentage requirement is necessarily going to be arbitrary, 1% is a fair minimum to serve the state's compelling interest in this regard.

The Court in *Jenness*, 403 U.S. at 441, pointed out that "a large reason" for the invalidation of the Ohio

election scheme in *Williams* was Ohio's requirement that small parties establish "elaborate statewide, county-by-county, organization paraphernalia." The Texas requirement of precinct, county, and state conventions is obviously more burdensome than the Georgia scheme upheld in *Jenness*, but is clearly more hospitable to new or small parties than was the "entangling web of election laws" invalidated in *Williams*. Following the *Jenness* command to look to the "totality" of a state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible.

* * *

We agree with the State's contentions. The Courts recognize a state's compelling interest to preserve the integrity of its election process. Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. "He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*, [369 U.S. 186 (1962)]." Several Courts have found that a state has an interest in preventing "raiding," whereby members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. So long as these "anti-raiding" provisions are narrowly drawn, as is the challenged Texas provision, the right of disaffected voters to associate in a new political party is not unduly burdened.

* * *

There is apparently no workable alternative to the requirement that each person who signs a petition be ad-

ministered an oath if the state is to be able to enforce its criminal penalties against cross-over voting and apprise the voters of these possible penalties. Given the state's interest in insuring that different candidates for the same office are supported by different voters, we uphold the oath requirement for want of a feasible alternative.

* * *

Nor does the Court find a violation of Equal Protection. The states have broad discretion in formulating election policies. *Williams v. Rhodes*, 393 U.S. at 34. The Supreme Court in *Jenness v. Fortson*, 403 U.S. at 411 recognized that holding primary elections involved burdens equal to those encountered in circulating nominating petitions.

* * *

Although the State of Texas does not offer any reasons for though the State of Texas does not offer any reasons for the lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

* * *

VII.

Plaintiff Laural N. Dunn, independent candidate for the United States House of Representatives, represents

himself and several other independent candidates in their challenge of article 13.50 of the Texas Election Code, which sets out the requirements independent candidates must meet in order to get on the general election ballot. The other plaintiffs represented by Dunn are two independent candidates for the Texas House of Representatives, one independent candidate for the Texas Senate, and one independent candidate for county commissioner of McClennan County, Texas.

* * *

Nevertheless, we conclude for the same reasons stated in Part III of this opinion that the requirements of article 13.50 serve a compelling state interest and do not operate to suffocate the election process. Nor are they violative of Equal Protection. The totality of the scheme imposed upon independent candidates is even less burdensome than that required of political parties. For these reasons we hold article 13.50 constitutional and deny relief to plaintiffs.

* * *

UNITED STATES DISTRICT COURT
Western District of Texas—Austin Division

ROBERT W. HAINSWORTH

v.

BOB BULLOCK, Secretary of State

A-72-CA-111

ORDER DENYING MOTION FOR REHEARING

Before THORNBERRY, Circuit Judge; SUTTLE, District Judge; and WOOD, District Judge.

PER CURIAM

On this 3rd day of October, 1972, came before the Court in the above styled cause, plaintiff's Motion for Rehearing filed herein on September 29, 1972. The Court, having considered the Motion and the files and records of the case, finds and rules as follows:

1. A hearing was held before this three-judge panel on September 7, 1972, with plaintiff, appearing pro se, and counsel for the defendant present. By agreement of counsel on both sides in this case, the Court consented to hear oral arguments by counsel, along with the oral argument in the consolidated four cases heard as *Raza Unida Party, et al v. Bob Bullock, et al*, SA-72-CA-158 (W. D. Tex., Sept. 15, 1972) all such three-judge court cases being found by the Court as presenting in combination similar issues. Whereupon, oral arguments were presented by all counsel of record for each of the parties, and the Court took the consolidated cases and this case under advisement.

2. At the conclusion of the hearing in this case, plaintiff was directed to file a supporting brief, which was filed on September 11, 1972. Defendant respondent on September 14, 1972, by filing a Motion to Dismiss and Trial Brief. At that time defendant waived any notice of hearing required by 28 U.S.C. § 2284 (2), and relied upon the oral argument and authorities presented at the hearing on September 7, 1972. [See letter of September 13, 1972 from Sam L. Jones, Assistant Attorney General to Dan W. Benedict, Clerk, attached herein as Exhibit "A"].

3. Based upon the remarks of counsel presented at the hearing on September 7, 1972, briefs submitted by the parties and the files and records of the case, this Court determined that no further oral arguments or evidentiary hearing was needed to present the issues in this cause. For the reasons fully discussed in Part III and Part VII of our Opinion in *Raza Unida Party v. Bullock*, *supra*, and based upon the authorities cited therein, this Court found that Article 13.50 of the Texas Election Code served a compelling state interest and was not violative of Equal Protection as applied to plaintiff Robert W. Hainsworth. Memorandum Order and Judgment to this effect was entered on September 19, 1972.

4. This Court finding no basis to amend its Judgment of September 19, 1972, it is accordingly ORDERED that plaintiff's Motion for Rehearing is hereby, in all things, DENIED.

Entered this 3rd day of October, 1972.

HOMER THORNBERRY
Homer Thornberry, Circuit Judge

D. W. SUTTLE
D. W. Suttle, District Judge

JOHN H. WOOD, JR.
John H. Wood, Jr., District Judge

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: **SHIRLEY JONES, Deputy.**

**UNITED STATES DISTRICT COURT
Western District of Texas—Austin Division**

ROBERT HAINSWORTH, *Petitioner*

v.

**BOB BULLOCK, SECRETARY OF STATE
OF TEXAS, *Respondent***

A-72 CA 111

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

1. Notice is hereby given that Robert Hainsworth, the petitioner above named, hereby appeals to the Supreme Court of the United States from the Final Order denying motion for rehearing entered in this action on October 3rd, 1972.

This appeal is taken pursuant to 28 U.S.C.A., Sections 1253, 2281, and 2101 (b).

2. The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

- a. Plaintiff's Petition for Preliminary Injunction.
- b. Plaintiff's Application for Three-Judge Court.
- c. Plaintiff's Motion to Convene Three Judge Court.
(4 pages)
- d. Transcript of oral argument in Case No. A 72 CA 111, heard on September 7, 1972.

- e. Defendant's Motion to Dismiss.
 - f. Plaintiff's Motion in Reply to Notice of Motion of Defendant.
 - g. Memorandum Order and Judgment, dated 19th day of September, 1972.
 - h. Motion for Rehearing. (1 page)
 - i. Order Denying Motion for Rehearing.
 - j. Respondent's Opposition to Motion for Rehearing.
 - k. Plaintiff's Motion for Stay and Injunctive Relief.
 - l. Any other matters required by law to be included.
3. The following question is presented by this appeal: Whether Art. 13.50 of the Texas Election Code, V.A. T.S., violates the Constitution of the United States, Section 1, Amendment XIV, in its provisions and requirements for an independent candidate to get name on general election ballot?

Robert Hainsworth, Petitioner
ALVIN BUILDING
3710 Holman Avenue
Houston, Texas 77004

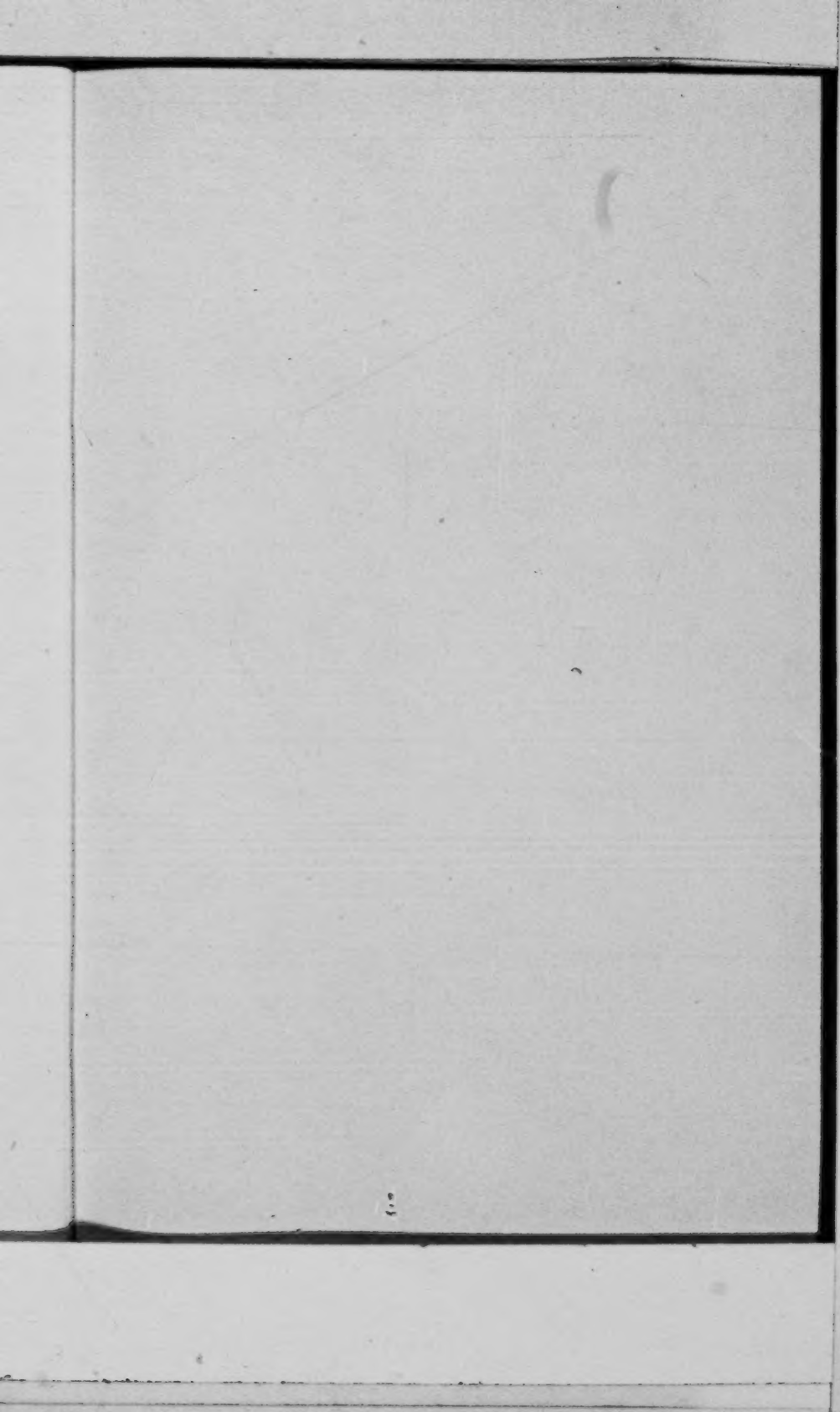
PROOF OF SERVICE

I, Robert W. Hainsworth, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of November, 1972, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Respondent, as follows:

On the Honorable Bob Bullock, Secretary of State of Texas by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Honorable Crawford C. Martin, the Attorney General of the State of Texas, The Supreme Court Building, Austin, Texas 78711.

Robert W. Hainsworth
Attorney for Petitioner
ALVIN BUILDING
3710 Holman Avenue
Houston, Texas 77004

Notice of Appeal filed on November 2, 1972, in the United States District Court for the Western District of Texas, Austin Division.



JAN 20

MICHAEL RODAK,

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, et al.,
Appellants

v.

BOB BULLOCK

Appellee

NO. 72-942

ROBERT HAINSWORTH,

Appellant

v.

BOB BULLOCK, SECRETARY OF STATE

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 72-887

RAZA UNIDA PARTY, et al.,
Appellants

v.

BOB BULLOCK, Secretary of State of Texas
Appellee

AMERICAN PARTY OF TEXAS, et al.,
Appellants

v.

BOB BULLOCK
Appellee

LAUREL DUNN, et al.,
Appellants

v.

BOB BULLOCK, et al.
Appellees

TEXAS NEW PARTY, TEXAS SOCIALIST
WORKERS PARTY, et al.,
Appellants

v.

PRESTON SMITH, et al.
Appellees

and
NO. 72-942
ROBERT HAINSWORTH,

Appellant

v.

BOB BULLOCK, SECRETARY OF STATE

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

The Appellees respectfully move the Court to dismiss the appeal in these causes on the ground that the appeals do not present substantial federal questions unresolved in the federal courts, and further move the Court, in the alternative, to affirm the judgments sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

A Three-Judge United States District Court for the Western District of Texas, San Antonio Division, on September 15, 1972, entered a Memorandum Opinion and Order, which is yet unpublished, discussing each of the four consolidated complaints and denying all relief requested by the Appellants; a separate Memorandum Order and Opinion was entered by the same Three-Judge Court on September 19, 1972, dismissing the complaint in No. 72-942.

JURISDICTION

The Appellants seek to invoke the jurisdiction of this Court under 42 U.S.C., Section 1971, Section 1981, and Section 1983, and the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States. A Three-Judge Court was convened pursuant to 28 U.S.C., Section 2281.

STATUTES INVOLVED

Appellants, in No. 72-887, attach relevant portions of the challenged provisions of the Texas Election Code and the McKool-Stroud Primary Financing Law of 1972 as Appendix D to their Jurisdictional Statement at page 44; Mr. Hainsworth, in No. 72-942, sets out challenged Article 13.50 on page 3 of his Jurisdictional Statement.

QUESTIONS PRESENTED

The Appellees will attempt to summarize more specifically the basic questions raised by Appellants in their Jurisdictional Statement on pages 3 and 4, noting that Appellants have abandoned some questions which were ruled upon by the Three-Judge District Court.

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot, there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?

2. Are the provisions of Article 13.45(2), which prohibit the circulation of the petitions until the day following the primary elections and prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

3. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the Secretary of State within a 55-day period, constitutionally impermissible?

4. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petition, constitutionally impermissible as being too burdensome?

5. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissible?

6. Is the Texas Election Code so invidiously discriminatory in not providing absentee balloting for minority and independent candidates as to be constitutionally impermissible?

7. Are the requirements of Article 13.50 as applied to Appellants so burdensome as to be constitutionally impermissible?

8. Whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional?

STATEMENT OF THE CASE

Appellees will accept the factual statements of the case related by Appellants in their Jurisdictional Statement but reject the conclusions and opinions contained therein as not being a proper or accurate statement.

**THE QUESTIONS AS PROPERLY PRESENTED
ARE NOT SUBSTANTIAL**

**APPELLEES RELY UPON AND CITE FROM
THE THREE-JUDGE COURT'S MEMORAN-
DUM OPINION, APPENDIX A (APPEL-
LANT'S JURISDICTIONAL STATEMENT).**

Quoted in part, on page 18, as follows:

"Texas affords four alternative methods of nominating candidates to the ballot for a general election. First, candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only. Second, candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor, may be nominated by primary election or by nominating convention. Third, candidates of parties whose candidates polled less than 2% of the total gubernatorial vote in the last general election, and parties who did not have a nominee for governor in the last general election, may be nominated by convention only, or by fulfilling additional requirements set out in Article 13.45(2) of the Texas Election Code. Fourth, nonpartisan and independent candidates' names may be printed on the ballot after fulfilling the qualifications set out in Article 13.50 of the Texas Election Code."

Quoted further, in part, from page 19 as follows:

"Because we believe that Courts should exercise restraint in overturning State laws unless clearly unconstitutional, we find that the totality of the Texas Election Code serves a compelling state interest and does not operate to suffocate the election process."

Quoted further, in part, from page 20 as follows:

"Defendants move to dismiss the complaints in Raza Unida Party v. Bullock and Socialist Work-

ers Party v. Bullock wherein they challenge Art. 13.45(2) of the Texas Election Code. Defendants argue that plaintiffs in the two suits lack standing, and that their cases are moot, because, after their suits were filed, *the Texas Secretary of State on August 8, 1972, certified that Raza Unida Party and the Socialist Workers Party had complied with the provisions of Art. 13.45(2) and should be placed on the ballot for the November Election. The plaintiffs admit that they could receive no further relief from this Court in this Election year. Nevertheless, plaintiffs maintain that they are proper parties who continue to present a justiciable 'case or controversy' because excessive funds were spent by them this year in order to comply with the burdensome procedures of the Texas Election Code, and they want assurance that they will not have to repeat the process in the next election year.*" (Emphasis added.)

Quoted further, in part, from page 24 as follows:

"The State of Texas argues that it has a compelling interest in requiring some minimum amount of support before placing a candidate's name on the ballot and in assuring that all candidates are in fact seeking elective office in good faith. The Court agrees that these are valid state objectives. A review of the decisions since *Williams v. Rhodes*, supra, leads this Court to conclude that the totality of the scheme required by Article 13.45(2) is not constitutionally impermissible."

Quoted further, in part, from page 26 as follows:

"We agree with the State's contentions. The Courts recognize a state's compelling interest to preserve the integrity of its election process. Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. 'He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v.*

Carr (369 U.S. 186 (1962)).’ ”

Further, in part, on page 27:

“While the State has shown a valid interest which must be recognized, the plaintiffs have made no showing that these requirements have actually denied to them rights secured by the United States Constitution. We can find nothing in this system which abridges the rights of free speech and association secured by the First and Fourteenth Amendments.”

Further, in part, on page 28:

“As the Court aptly stated in *Tansley v. Grasso*: It may well be that the plaintiffs have strong feelings that this legislative distinction creates an unnecessary burden upon prospective candidates for public office, however, if their claim has any merit their proper forum is before the state legislature. The plaintiffs have shown no invidious discrimination.”

ARGUMENT QUESTION NO. 1

(Restated)

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot, there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?

1. Appellees rely upon the holding by the Trial Court that a review of the decisions since *William v.*

Rhodes, 393 U.S. at 32, led the Court to conclude that the totality of the scheme required by Article 13.45(2) is not constitutionally impermissible.

Certainly the minimal 1% required by Texas to show voter support as a condition for ballot position serves a legitimate state objective. *Peoples Party v. Tucker*, No. 72-102 (M.D. Pa., June 7, 1972, 270): *Socialist Workers Party v. Rhodes*, 318 F.Supp. 1262 (S.D. Ohio, 1970), appeal dism'd, 405 U.S. 949 (1972) (7%); *Jenness v. Fortson*, 403 U.S. at 442 (1% to 5%).

QUESTION NO. 2

(Restated)

2. Are the provisions of Article 13.45(2), which prohibit the circulation of the petitions until the day following the primary elections and prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

2. Appellees argue that the requirement that a new party hold a precinct convention on primary day affords that party an equal opportunity with all other parties to attract the voter to its political process. Thus, if the party has at least 1% support, and the people attend the convention, there is no need for the petition requirement at all. Additionally, if the petitions are circulated well in advance of the precinct conventions and primary elections, a voter may sign before another party's position has crystallized and the voter would be precluded from changing his mind. Further, Appellees argue that by delaying the petition circulating process until after the primary election, there is less chance that individual voters will become confused or engage in the party process of more than

one party. The Three-Judge District Court agreed that existing Supreme Court cases follow the Appellees argument. *Baker v. Carr*, 369 U.S. 186 (1962); *Jackson v. Ogilvie*, 325 F.Supp. at 867; *Lippitt v. Cipillon*, 404 U.S. 1032 (1972).

QUESTION NO. 3

(Restated)

3. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the Secretary of State within a 55-day period, constitutionally impermissible?

3. Appellees argued in the Trial Brief submitted to the Trial Court in support of the requirement that a new party circulate and obtain within a 55-day period (120 days before the general election) the required signatures to be filed with the Secretary of State, the following:

a) a failure to obtain the required 1% at precinct conventions, and in the 55 days thereafter by petition, indicates that the political party involved lacks political support or initiative.

The Court agreed that the requirements are not to be unduly burdensome due to the fact that two of the minor political parties were able to obtain a place on the ballot by fully complying with provisions of the Texas Election Code.

b) a cut-off period of 120 days is necessary in order for the Secretary of State to check the validity of the signatures on the petitions in sufficient time to allow time for printing of the ballot and for any legal contests which may arise. *Ferguson v. Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972).

QUESTION NO. 4

(Restated)

4. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petition, constitutionally impermissible as being too burdensome?

4. The requirement under Article 13.45(2) for the administration of a prescribed oath before a Notary to those signing the petitions serves a compelling interest to insure that participants in one party's nominating process do not participate in another's. In arguments before the Trial Court, Counsel for Raza Unida Party admitted that the oath and notary requirements did not hinder their efforts to secure signatures. Further, the oath enables the state to enforce its criminal penalties against cross-over voting and apprise the voters of these possible penalties.

QUESTION NO. 5

(Restated)

5. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissible?

5. The requirement of the Texas Election Code that all persons seeking elective office file on the same date is valid and constitutional, and Appellants' contentions that such requirement is violative of equal protection and due process are without merit. *Socialist Workers Party v. Rhodes*, 318 F.Supp. 1262, (S.D. Ohio 1970); *Gilligan v. Sweetenham*, 405 U.S. 949 (1972).

QUESTION NO. 6

(Restated)

6. Is the Texas Election Code so invidiously discriminatory in not providing absentee balloting

for minority and independent candidates as to be constitutionally impermissible?

In *McDonald v. Board of Elections*, 394 U.S. 802, 807, 809, 811, absentee ballot legislation was treated as remedial legislation designed to extend the franchise to those who had previously been unable to exercise it. The Court stated that such legislation should not be invalidated merely because the legislature failed to cover persons who might benefit from it. Also, *Morey v. Doud*, 354 U.S. 457, 465 (1957).

QUESTION NO. 7

(Restated)

7. Are the requirements of Article 13.50 as applied to Appellants so burdensome as to be constitutionally impermissible?

The Court stated in its Memorandum Opinion (Appendix A, Appellants' Jurisdictional Statement) that:

"We reject outright Plaintiffs' argument that states can impose no additional election requirements other than those found in the United States Constitution."

Appellants presented no factual basis in support of their general allegation that the provisions of Article 13.50 are "unduly burdensome" as to them. They admitted in oral arguments that they made no attempt to comply with the provisions of Article 13.50.

The Court correctly held that the requirements of Article 13.50 serve a compelling state interest and do not operate to suffocate the election process and are not violative of Equal Protection under the Fourteenth Amendment. *Bullock v. Carter*, 405 U.S. at 145, 146.

QUESTION NO. 8

(Restated)

8. Whether the McKool-Stroud Primary Fi-

nancing Bill of 1972 is unconstitutional?

8. The McKool-Stroud Act was passed to provide financing for party primaries after the Supreme Court held that the Texas filing fee requirements were unconstitutional in *Bullock v. Carter*, supra. The Act provides that the State of Texas will finance the primary elections of only those political parties casting 200,000 or more votes for governor in the last preceding general election.

When a minority party reaches a size where they are forced to conduct party primary elections under the provisions of the Texas Election Code, they will then be entitled to be the recipients of the State's financial assistance. Such an arrangement is constitutionally permissible.

CONCLUSION

Appellee respectfully submits that the Jurisdictional Statement of Appellants presents no substantial federal questions not unresolved by prior decisions in the federal courts, and that the authorities cited and argument given by Appellees manifestly shows that the questions raised are so unsubstantial as not to require further argument.

Appellee therefore respectfully moves the Court to dismiss the appeals or, in the alternative, to affirm the judgments entered in these causes by the Three-Judge District Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Sam L. Jones, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, postage pre-paid to the attorney for the American Party of Texas and Laurel N. Dunn: Gloria T. Svanas, 418 West Fourth Street, Odessa, Texas 79761; the attorney for the Texas New Party and Texas Socialist Workers Party: Michael Anthony Maness, 410 Houston Bar Center, 723 Main Street, Houston, Texas 77002; and Mr. Robert W. Hainsworth, Alvin Building, 3710 Holman Avenue, Houston, Texas 77004.

SAM L. JONES, JR.

IN THE
Supreme Court of the United States
October Term, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, *et al.*,
Appellants

v.

BOB BULLOCK, *Appellee*

NO. 72-942

ROBERT HAINSWORTH, *Appellant*

v.

BOB BULLOCK, SECRETARY OF STATE
OF TEXAS, *Appellee*

On Appeal From The United States District Court
For The Western District of Texas

BRIEF OPPOSING MOTION TO DISMISS
OR AFFIRM

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IN THE
Supreme Court of the United States
October Term, 1972

NO. 72-887

RAZA UNIDA PARTY, *et al.*, *Appellants*

v.

BOB BULLOCK, SECRETARY OF STATE
OF TEXAS, *Appellee*

AMERICAN PARTY OF TEXAS, *et al.*, *Appellants*

v.

BOB BULLOCK, *Appellee*

LAUREL DUNN, *et al.*, *Appellants*

v.

BOB BULLOCK, *et al.*, *Appellees*

TEXAS NEW PARTY, TEXAS SOCIALIST
WORKERS PARTY, *et al.*, *Appellants*

v.

PRESTON SMITH, *et al.*, *Appellees*

AND

NO. 72-942

ROBERT HAINSWORTH, *Appellant*

v.

BOB BULLOCK, SECRETARY OF STATE
OF TEXAS, *Appellee*

On Appeal From The United States District Court
For The Western District of Texas

**BRIEF OPPOSING MOTION TO DISMISS
OR AFFIRM**

To The Honorable Supreme Court:

Appellant herein respectfully shows to the Court the following, as additional reasons why the appeal in this case should not be dismissed, nor the judgment sought to be reviewed, affirmed.

STATEMENT

In the Questions Presented, on pages 3 and 4 of Appellees' Motion to Dismiss or Affirm, the principal or only question presented of the 8 Questions set out by Appellees that applies to Case No. 72-942, Hainsworth v. Bullock, Secretary of State, is Question 7, on Page 4, namely:

"7. Are the requirements of Article 13.50 as applied to Appellants so burdensome as to be constitutionally impermissible?"

And in the argument of Appellees in Motion to Dismiss or Affirm, under Question No. 7 (Restated), on page 11, there is this quote:

"The Court stated in its Memorandum Opinion (Appendix A, Appellants' Jurisdictional Statement) that:

"We reject outright Plaintiffs' argument that states can impose no additional election requirements other than those found in the United States Constitution."

Appellants presented no factual basis in support of their general allegation that the provisions of Article 13.50 are "unduly burdensome" as to them. They admitted in oral arguments that they made no attempt to comply with the provisions of Article 13.50."

ARGUMENT

The above quotes do not pertain to the case of Hainsworth v. Bullock, for such appellant did not make the argument that states can impose no additional election requirements other than those found in the United States Constitution.

And also, the said appellant, made a strong effort to comply with the provisions of Art. 13.50. (Tr. Pages 53 to 56), and (Tr. Page 105).

CONCLUSION

For the foregoing reasons, together with those reasons already set forth in the Jurisdictional Statement of Appellant in Hainsworth v. Bullock, it is respectfully submitted that a substantial question is presented by this appeal for the decision of the Supreme Court, and that review should be granted, with briefs on the merits and oral argument, for resolution.

Respectfully submitted,

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SUPREME COURT, U. S.

FILE

APR 19

In the

MICHAEL RODAK,

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

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Appellee.

No. 72-942

ROBERT HAINSWORTH,

Appellant,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee,

*Appeal from the United States District Court for
the Western District of Texas*

BRIEF FOR APPELLANTS AMERICAN PARTY OF TEXAS

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*Attorney for American Party
of Texas.*

April, 1973.

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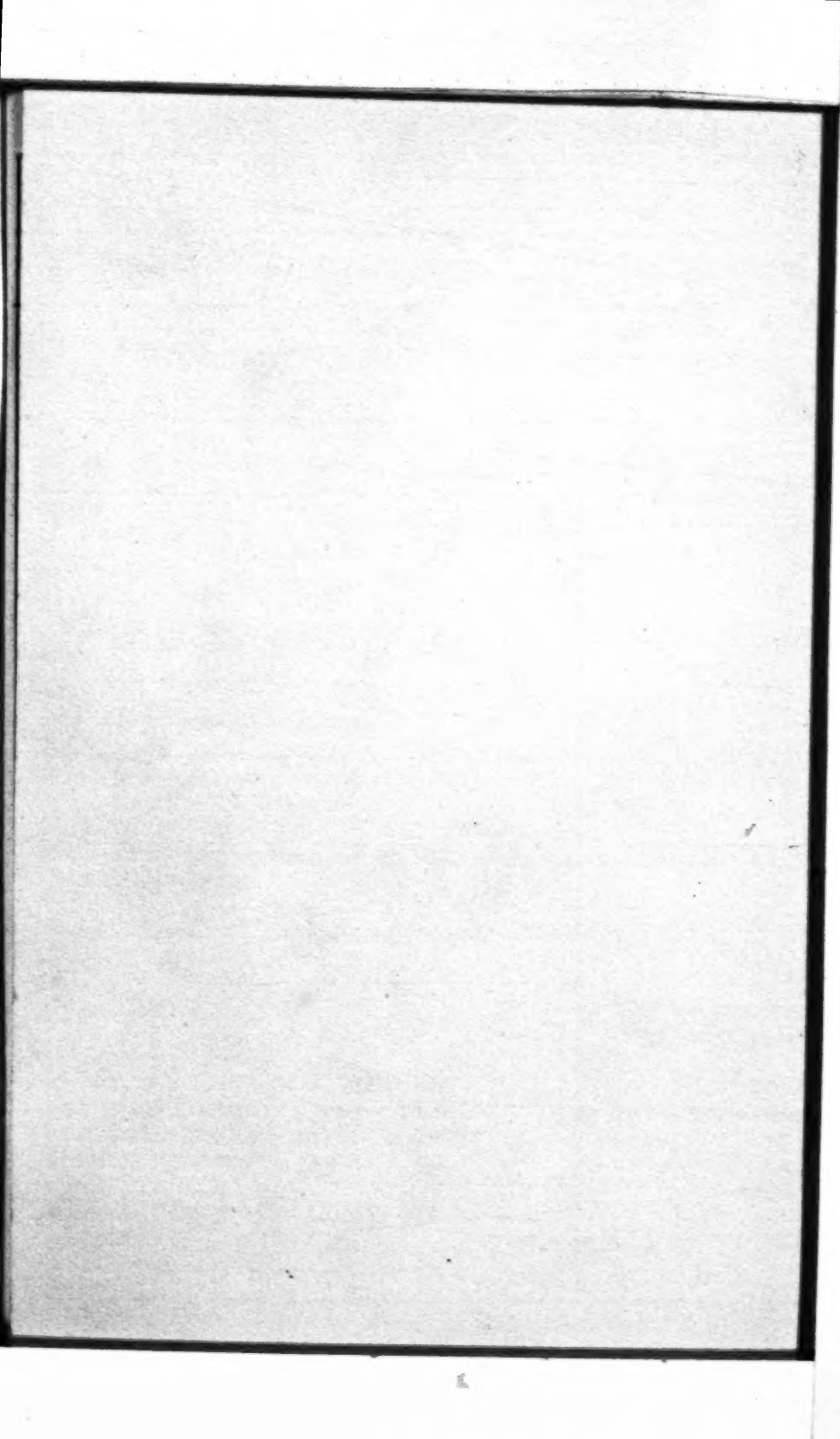
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RIGHT TO VOTE

TEXAS STYLE		GEORGIA
Democrat & Republican	ALL Third Parties	ALL Voters
PARTY PRIMARY: 200,00 Votes For Party Nominee For Govenor		ALL Parties 20% of votes cast for Govenor or President in last election
Automatic	One Year of Preliminary Party Organization	NONE
60 Days ABSENTEE Voting Paid for by State	NONE	Simultaneous for ALL Voters 180 days for Petitions
PARTY PRIMARY No limit on numbers of candidates for nomination Tax funds used to pay all PARTY expenses including 5% bonus to Party Chairman Participation is Party Registration	NCW hold precinct conventions ALL Party Voters PROHIBITED to sign petitions NCW begin Petitions in exact form Print * Circulate * Sign & Notarize	Unlimited cross signing by ALL Voters Simple form Petitions NO Oath
SECOND (RUN-OFF) PRIMARY Tax funds used to pay all PARTY expenses including 5% bonus to County Chairman \$3,000,000.00 Total cost to taxpayers in 1972	HOLD COUNTY CONVENTIONS Petitions signed by 1% of total vote for Govenor FILED with State within 55 days LIMITATION All costs paid by voters in Party	5% eligible vote for that office

In the
Supreme Court of The United States
OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

Appellants,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee.

No. 72-942

ROBERT HAINSWORTH,

Appellant,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee,

*Appeal from the United States District Court for
the Western District of Texas*

BRIEF FOR APPELLANTS
AMERICAN PARTY OF TEXAS

SUMMARY STATEMENT OF THE CASE

AMERICAN PARTY OF TEXAS, Appellant, was a viable political party in Texas in 1968 with 91,958 registered party members by participation in precinct conventions. George Wallace as the Party's nominee and standard-bearer received 584,269 votes in Texas for the Presidency of the United States. Statutorily,¹ the right to ballot position in the general election

¹ Election Art. 13.45 at Appendix C.

in Texas is regulated by the number of votes received by the nominee for governor in the last preceding general election. The AMERICAN PARTY had no gubernatorial nominee in 1968 or in 1970.

A political party with state-wide organization is limited to a single exact procedure to nominate candidates for ballot position under its party label.² There is no alternative access to the ballot.

On September 1, 1971, more than 14 months prior to the 1972 Presidential Election, the AMERICAN PARTY OF TEXAS began the statutorily prescribed detailed steps to nomination by convention by filing its declaration of intention to nominate by convention.³ On February 22, 1972, the State Executive Committee certified to the Secretary of State the names of persons who had filed on or before February 7, 1972,⁴ to be candidates for the AMERICAN PARTY'S nomination. Party Rules were adopted and filed with the Secretary of State.⁵ The American Party of Texas continuatively held precinct conventions⁶ for the election of delegates to the county conventions, held county conventions for nomination of precinct, county and district candidates and election of delegates to State Convention; and held the State Convention on June 10, 1972, and certified to the Secretary of State the nominees for state-wide offices. All of the nominees were summarily denied ballot position and there was no AMERICAN PARTY label on the general election ballot because only 2,732 persons signed sworn statements

² Election Art. 13.45 (1969) Appendix A page A-5

³ Election Art. 13.46 (1963)

⁴ Election Art. 13.12 (3) (1969)

⁵ Election Art. 13.43 (b) (1971)

⁶ Election Art. 13.47 (1967) Appendix A page A-7

of participation in precinct conventions and only 5,096 registered voters who had not participated in the primary of another political party were willing to sign notarized petitions to gain ballot position for the AMERICAN PARTY. These petitions could not be circulated before party primary day, and the deadline for filing of the petitions was June 30th,⁷ a mere 55 days to obtain in excess of 22,000 notarized signatures of registered voters who were unable or unwilling to participate in a state-tax-paid for party primary or run-off primary of a major political party. In most campaigns the Democratic primary nomination is tantamount to election in Texas.

The Texas Election Code specifically requires all candidates complete their applications for nomination under a party label and file before 6 p.m. on the first Monday in February. Each of the political parties certifies the list of candidates so filing to the Secretary of State within 10 days after the first Monday in February.⁸ In February, 1972, the Secretary of State as the Chief Election Official in Texas knew there would be but 6 possible political parties seeking ballot position in November, 1972, and these political parties would be only the Democratic, Republican, the American Party of Texas, Texas New Party, Texas Socialist Workers Party, and Raza Unida which together with a column for independent candidates would establish a general election ballot of seven columns only.

Based on this Court's ruling in *Bullock v. Carter*¹⁰, the Governor of Texas called a Special Session of the Legislature in

⁷ Election Art. 13.45 (2) (1969) Appendix A page A-5

⁸ Election Art. 13.12 (2) Appendix A page A-2

⁹ Election Art. 13.12 (3) Appendix A page A-4

¹⁰ 405 U. S. 134

March, 1972, for the limited purposes of enacting a billboard law to comply with the Federal Highway Act and to enact a Primary Financing Law. The intent of the Legislature in enacting the Primary Financing Law of 1972,¹¹ was stated:

"Section I. Purpose

The invalidation by federal court decisions of the statutory method of financing primary elections in this state necessitates legislative action to provide a solution to the *impasse facing political parties* which cast more than 200,000 votes for Governor in the last preceding general election, in that the existing law requires that their nomination for the general election be made in primary elections but *they* are left without adequate means to finance the primaries * * *

Section 2. Conduct of the Primary Elections

Nominations for the general election to be held on November 7, 1972, shall be made in the *manner provided in the Texas Election Code*. The primary elections held by a political party pursuant to Section 180 and 181, Texas Election Code (Articles 13.02 and 13.03 Vernon's Texas Election Code) shall be conducted through the *party's state executive committee and county executive committees* * * *

The Texas Legislature specifically provided for the cost and primary expenses of the Democratic political party and the Republican political party and excluded by omission the nominating expenses of the four minority parties nominating by convention in 1972.

AMERICAN PARTY OF TEXAS filed suit in the United States District Court for the Western District of Texas, Midland-Odessa Division, seeking a temporary injunction against the statutory exclusion of the AMERICAN PARTY from general

¹¹Vol. 9, V.A.C.S. Election 13.08 C-1, Appendix A at A-8

election ballot position and challenging the constitutionality of V.A.C.S. Election § 13.45 and attacking the constitutionality of payments out of State tax funds for the Democratic and Republican Party primaries under the Primary Financing Law of 1972.

On June 14, 1972, after notice and hearing, the District Court¹² entered a Temporary Restraining Order against the Secretary of State of Texas, restraining him from refusing to accept and file supplemental nominating petitions obtained by the AMERICAN PARTY between June 30, 1972, and September 1, 1972. The AMERICAN PARTY continued to circulate these petitions and secured 17,678 additional signatures.

The AMERICAN PARTY also pursued its attack on the Primary Financing Law of 1972¹³ by filing its Motion for Ancillary Relief to prevent any payments to be made under the Act until its constitutionality had been judicially determined. The District Court¹² summarily denied the Restraining Order against the payments pursuant to the Primary Financing Law by Order entered June 16, 1972.

The AMERICAN PARTY immediately filed its Motion for Hearing for June 30, 1972, and this Motion was denied by Order entered June 26, 1972, with notification to the Honorable John R. Brown, Chief Judge of the United States Court of Appeals for the 5th Circuit for an order consolidating the cases pending in Texas involving the same issues.

The Order of Consolidation was entered on July 28, 1972, consolidating RAZA UNIDA PARTY, et al, v. BOB BUL-

¹²USDC — Western Dist. Tex. Midland-Odessa Division, Suttle, J.

¹³Vol. 9, V.A.C.S. Election 13.08 C-1, Appendix A, page A-8

LOCK, SA-72-CA-158; AMERICAN PARTY OF TEXAS, et al, v. BOB BULLOCK, MO-72-CA-50; LAUREL DUNN, et al, v. BOB BULLOCK, W-72-CA-37; TEXAS NEW PARTY, et al, v. PRESTON SMITH, Governor, and BOB BULLOCK, C. A. 72-H-990, in the United States District Court for the Western District of Texas, San Antonio-Division and ordering the impaneling of a 3-Judge Federal Court. By Order of July 31, 1972, the cases were set for hearing on the merits in San Antonio Division of the United States District Court for the Western District of Texas for Thursday, September 7, 1972.

On August 31, 1972, pursuant to the Temporary Restraining Order entered on June 14, 1972, the State Chairman of the AMERICAN PARTY certified the filing of 17,678 names to the Secretary of State urging the nominees of the AMERICAN PARTY to be placed on the general election ballot.¹⁴ The AMERICAN PARTY OF TEXAS had then certified 25,506 names of qualified voters on sworn petitions requesting that the names of the Party's nominees be printed on the general election ballot.

¹⁴Vol. 9, V.A.C.S. Election Art. 13.45 (2) required that the address and registration certificate number of each signer be shown on the petition and further than no person who, during that voting year, had voted at any primary election or participated in any convention or any other party shall be eligible to sign the petition and that to each person who signs the petition, there shall be administered the oath: "I know the contents of the foregoing petition requesting the names of the nominees of the AMERICAN PARTY be printed on the ballot for the next general election. I am a qualified voter at the next general election under the Constitution and Laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party." The Certificate of the Officer administering the oath may be so made as to apply to all to whom it was administered.

The facts before the 3-Judge panel of the United States District Court for the Western District of Texas were presented by stipulation. The Motions, Orders and stipulations are contained in the printed Appendix.

All of the nominees of the AMERICAN PARTY and the AMERICAN PARTY label were excluded from the general election ballot in Texas in 1972.

OPINION BELOW

On September 15, 1972, a 3-Judge Federal District Court convened in the Western District of Texas, San Antonio Division, entered a Memorandum Opinion and Order dismissing each of the four consolidated complaints and denying all relief requested by Plaintiffs. The Temporary Restraining Order extending the time to gather the signatures on nominating petitions was dissolved, and all signatures (17,678) obtained during that period were held to be null and void. The District Court's Opinion is printed at 349 Fed. Supp. 1272 and is contained in the Appendix A at Page 17 of the Jurisdictional Statement.

American Party of Texas filed an Application for Temporary Restraining Order with this Court, No. A-325, which was denied by the Court on October 5, 1972, with Mr. Justice Douglas, dissenting. This succinct dissent is printed at U.S., 34 L Ed 2d 63-64, and is contained in Appendix B *infra*.

Probable jurisdiction was noted by Order of the Court on March 5, 1973.

No other preliminary or interim orders have been entered.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution. The challenged provisions of the Texas Election Code are Volume 9 of Vernon's Annotated Civil Statutes Election Articles 13.12, 13.45 and 13.47 (as amended) hereinafter cited as Election Art. Election Article 13.08 c-1, also cited as the [McCool-Stroud] Primary Financing Act of 1972; which are reprinted in Appendix A. Page A-8 V.A.C.S. Election Art. 13.45 (1963) which was the applicable law prior to the (1969) amendment is reprinted in Appendix C.

Questions Presented

1. Whether the totality of the general election ballot certification requirements imposed on minority parties and independent candidates by the Texas Election Code, including provisions forcing such parties and candidates to obtain the *notarized* signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty,

Due Process and Equal Protection guaranteed by the First and Fourteenth Amendments.

2. Whether a State election law prohibiting minority parties and independent candidates from circulating nominating petitions for the general election until after the major party primary elections, and further providing that a voter who has previously participated in a major party's primary election or nominating convention is thereafter ineligible to sign a nominating petition during the same election year, abridges the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

3. Whether a State election law financing major party primary elections but denying financial assistance to minority parties required by State law to incur substantial expense in placing their candidates' names on the general election ballot is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

4. Whether a State election law permitting absentee balloting for a major party candidate but precluding an absentee vote for a minority party or independent candidate is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Texas Election Code is invidiously designed to exclude from the election procedures those unorthodox individuals known conjunctively as minority parties. These individuals as members of the American Party of Texas, the Texas New Party, Raza Unida, and the Texas Socialist Workers Party by operation of the restrictive and oppressive details of Art. 13.45 (2) of the Texas

Election Code are being denied their constitutionally protected rights of assembly in support of their political beliefs which rights are guaranteed by the First Amendment to the United States Constitution. These individuals are being summarily excluded from their right to cast an effective vote for the candidate of their choice which right is protected by the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the United States Constitution.

The Democratic Party has historically manipulated Texas Government as a party agglutinant. Nevertheless, biennial revisions of the Texas Election Code have proved insufficient to exclude the Republican Party and the rising minority parties. It was obvious that immediate and more stringent revisions of the Election Code¹⁵ were the only solution to prevent recurrence of the 594,000 votes cast in 1968 for the minority candidate for the President of the United States. In addition to the extensive detailed procedural requirements for certification as a party of state-wide organization as a prerequisite to secure the right to nominate by convention, the Texas Legislature in 1969 invidiously amended Art. 13.45 to require that proof of participation in the third party be evidenced by notarized petitions in exacting detail. Potential participants in the minority party were excluded from absentee voting. Criminal sanctions prevented the voters in a major party primary from assisting the minority party to ballot position by signing the petition. After the registered voters had been subjected to the well-financed campaign and the news media cry for exercising the patriotic duty to vote, then and only then were the minority parties allowed

¹⁵Vol. 9, V.A.C.S. Election, Art. 13.45 (1963-Prior Statute) Appendix C. Amended Art. 13.45 (1969) Appendix A, page A-5

to begin to circulate petitions for ballot position.¹⁶ The minority parties were compelled to literally seek out those registered voters who were unwilling and unable to vote in either of the *State paid* for major party primaries. Meanwhile, the numerous candidates had been narrowed to *two* in the highly contested state-wide races such as the nomination for Governor, and again these candidates by spending in excess of \$1,000,000.00 cajoled and encouraged *all* voters to participate in the major party run-off primary just 30 days hence and wholly within the 55 days total allowance to minority parties to individually persuade these same registered but previous (primary) non-voters to sign a notarized petition wherever these left-over voters could be found with a notary in attendance. Four minority parties competed in seeking out these indifferent citizens and actually performed a great service in securing voter registration. The petitions had to be printed according to the exacting detail of the Statute in a sufficient number to assure adequate distribution for 23,000 signatures including name, address, registration number, date, oath and notary. Only Raza Unida and the Texas Socialist Workers Party succeeded in getting enough signatures within the time limitation, and both parties were certified by the Secretary of State for ballot position. The American Party of Texas had secured the printing of the petitions, had distributed the petitions, had secured the requisite number of signatures,¹⁷ paid the notary fees and filed the petitions with

¹⁶V.A.C.S. Election Art. 13.45 (2).

¹⁷During the additional time granted by the District Court under the Temporary Restraining Order; but, these signatures were held to be null and void by the Memorandum Opinion of the 3-Judge Federal Court below and this expenditure of monies and time was voided without recourse because the American Party was not on the general election ballot.

the Secretary of State. The nominees of the American Party were summarily excluded from the ballot.

The State of Texas out of its state tax funds paid in excess of \$3,000,000.00 to the Democratic political party and to the Republican political party to reimburse each political party for its total primary expense including printing ballots, salaried workers, buildings for voting and supplies. Based on the primary expense in each county, an additional 5% bonus was paid to the Party County Chairman. This is political party favor — Texas Style. The misnomer of a Primary Financing Law¹⁸ was really a disbursement of public tax monies to the Democratic and Republican parties. The obvious rewards were primary expenditures plus 5% bonus for the County Chairman. This disbursement of tax funds to a political party violated the equal protection clause and was a taking of property (from members of minority parties) without due process of law.

The Texas Legislature had successfully excluded effective party opposition by statutory denial of ballot position and had in fact nurtured this success by payments of tax monies to the democratic and republican parties. The obvious rewards were three-fold: (1) The Democratic party preserved its control of Texas by financially separating the party faithful from the opposition voter; and (2) the exclusion of the opposition party from ballot position guaranteed ineffective opposition in 1974 when the next ballot will be controlled by the numbers of vote received in 1972;¹⁹ and (3) prohibited the national

¹⁸V.A.C.S. Election Art. 13.08 c-1

¹⁹This reward is expected to increase by bills pending in the 1973 Session of the Texas Legislature which will again raise the vote for Governor requirement for ballot position specifically to exclude Raza Unida whose nominee did in fact receive more than 200,000 votes for Governor in 1972.

American Party from participation in the Federal funding of the Presidential campaign of 1976.²⁰

The Texas Election Code again emerged as the great political silencer. The unorthodox voter was again relegated to the historically Texas alternative of the negative vote.

ARGUMENT

I.

The Texas Election Code is invidiously designed to exclude from all election procedures those unorthodox individuals known conjunctively as minority parties.

A. Access to the Ballot is blocked.

The original complaints filed in the lower Court by the AMERICAN PARTY OF TEXAS, THE TEXAS NEW PARTY, THE TEXAS SOCIALIST WORKERS PARTY, and RAZA UNIDA in each instance contested the constitutionality of Vernon's Annotated Civil Statutes Election Article 13.45 of the Texas Election Code.²¹ These minority parties by constant diligence and unrelenting efforts had successfully completed each of the statutorily dictated intricate requirements for certification as state-wide political parties. They had met recurring deadlines over a period of many months during which a single omission or error in filing would have been fatal to the entire Party. In addition to these procedures, Article 13.45 (as amended in 1969) required proof of minimum party participation by nota-

²⁰Presidential Election Campaign Fund Act—Sec. 9001, Internal Revenue Code Act. of 1971, amending 26 U.S.C. (I.R.C. 1954) by adding 9001 et seq. Sec. 9002 (7) classifies a minor party as one whose candidate for the office of President in the preceding presidential election received, as the candidate for such party, 5% or more but less than 25% of the total popular vote in the U.S.

²¹Appendix A, page A-5

rized petitions signed by registered voters under oath giving their name, address, registration number, date and proof of unwillingness or inability to participate in another political party during that voting year.²² This Party participation so certified was required to be in a minimum number of 1% of the total votes cast for Governor in the preceding general election. By contrast, prior to the 1969 effective date of Art. 13.45 (as amended), any political party had ballot position in the general election by the fact of nomination which until 1967 had included write-ins in the party primaries.²³ The abolition of write-ins was directed against the Republican Party which had nominated its candidates for the general election ballot using write-ins in the party primary. Undoubtedly, many of the (Republican) pre-*Bullock v. Carter* candidates had been excluded from the Democratic party primary by the exorbitant filing fees. One of the keys to securing Republican candidates has been the minimal filing fees.

The obvious purpose of the Texas Legislature in its continuing revision of the Texas Election Code has been to perpetuate the control by the Democratic Party. With due respect to its past exclusion of the Republican Party, the Republican Party now exists in Texas, but without effective political power against the overwhelming control exerted by the Democratic party through the Texas Election Code. By analogy, the Code affords such predominating power to the Democratic party that it could

²²V.A.C.S. Art. 13.45 (2) A person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$500.

²³V.A.C.S. Election Art. 13.09 (Amended 1967) prohibits write-ins in primaries.

be compared to a bank which accepts your deposits, but by refusing to issue forms for checks prevents any withdrawals or participation. A further pursuit of the analogy shows that Democrats have the right of automatic withdrawal by party participation. The Democrat-controlled legislature through capricious, arbitrary and unreasonably detailed requirements of the Texas Election Code has made it virtually impossible for a new political party with or without²⁴ state-wide party organization to have its nominees appear under its party label on the general election ballot. The fundamental function of a political party primary is to nominate candidates who will advance the ideals and principals of that party.²⁵ The voters in Texas are denied the guide of a party label to choose electors pledged to particular candidates for the Presidency and Vice-Presidency of the United States. It is indisputable that printed ballot position for the candidate is necessary to election. More than 3,000,000 voters participated in the 1972 general election, and obviously exclusion of nominees from the printed ballot precluded election. This discrimination was proscribed in *Turner v. Fouche*.²⁶

" * * * appellants and members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal guarantees * * * "

²⁴Election Art. 13.54 Nominations by parties without State Organization; Election Art. 13.50 Nonpartisan and independent candidates.

²⁵The liberty of association is secured against intrusion by resort to the Fourteenth Amendment alone without invocation of the First Amendment. *Shelton v. Tucker*, 364 U. S. 479 (1960)

²⁶396 U.S. 346, 362 to 363 (1970).

B. The voter is rendered wholly ineffective by exclusion of the party from the ballot.

The thrust of the constitutional question is do ALL qualified voters in Texas have the right to equal protection of the law in their participation in the electoral process? The right to vote was long ago defined as a fundamental political right.²⁷ The right to exercise the franchise includes the right to cast one's vote effectively, whether the effectiveness be measured quantitatively²⁸ or qualitatively.²⁹ It is axiomatic under recent Supreme Court decisions that the fundamental interests involved in voting rights are to be protected from encumbrances other than those necessary to serve a compelling governmental interest.³⁰

This exclusion from ballot position and the resulting limitation on the opportunity to compete for the votes summarily prevents participation by a minority party under the provisions of the Presidential Election Campaign Fund Act. The discrimination surpasses the local control and permeates the 1976 Presidential Election Campaign.

C. The intentional discrimination violates State purpose.

Under Art. 13.45 (2) of the Texas Election Code, candidates for nomination by minority parties are required to secure the execution of a petition under oath before a notary public by qualified voters who have not voted in another party primary or participated in a party convention during that voting year.

²⁷*Yick Wo v. Hopkins*, 118 U. S. 356

²⁸*Reynolds v. Sims*, 377 U. S. 533

²⁹*Williams v. Rhodes*, 393 U.S. 23

³⁰*Kramer v. Union Free School District* 395 U. S. 621, 628; *Williams v. Rhodes*, *supra*; *Harper v. Virginia Board of Elections*, 383 U. S. 663.

³¹Section 9001 Internal Revenue Act of 1971 amending 26 U.S.C. (1954)

These petitions must be signed within a severely limited period of 55 days in an exact detailed form prescribed by the statute and must be paid for in full by the members of the minority party. The petition cannot be circulated until after the party primary day. There is no right of absolute voting.³² Categorically, the number of persons available to sign this petition is radically limited to those persons who are willing to abandon all other participation in the nomination process because of the prohibition against cross-signing with criminal sanctions for dual participation. The voter and the candidate for nomination in the major party primary participates in the luxury of absentee voting during a period of 60 days by mail for persons outside of the county and 20 days in person prior to the first primary and an additional 30 days until the second primary for a total of ninety (90) voting days, more or less. The party primary and second primary are paid for at expense of all taxpayers. The nominees of the major political parties still have available for their personal campaigns their own monies and contributions to defeat the third party candidate who has not yet financially recovered from the cost of the nominating process. The minority party voter and candidate must evidence minimal support by notarized petitions which actually constitute sworn omissions of such participation in any other party primary or conventions during that voting year. The petition necessitates expensive printing, duplicitious distribution and exhaustive efforts to approach the voters, secure the name, address, registration number and administer the oath and then affix the notary. By contrast, the

³²cf. *Jenness v. Fortson*, 403 U. S. 431 allowing 180 days for circulating petitions with cross-signing by all voters and simultaneous nominations for all candidates.

major party primary participants were welcomed by his party associates into an air-conditioned public building and furnished printed ballots or elaborate voting machines, all at public expense. The well-paid-workers used state supplies to note the names of voters who were not required to sign an affidavit nor was there any charge for a notary. The total cost of each county primary was the basis for the computation of the 5% bonus to the simultaneously elected Party County Chairman. Can there be any question that this "selective method" of payment by the State for the nomination processes for particular political parties only is not a denial of due process and equal protection of the law?³³

Does not the State interest, if any, in the nomination process include the protection of the votes of all of its qualified citizens and the nomination by the majority of all of the qualified voters of the candidate of their choice? Or does the State of Texas limit the voter to vote for or against a candidate of a major political party to have his votes counted? Is a write-in vote for President meaningful participation contemplated by this Court in *Carrington v. Rash*,³⁴ or, is this exclusion from ballot position the "fencing out" proscribed by *Carrington v. Rash*.³⁵

II.

The Primary Financing Law of 1972 has as its obvious purpose the payment of public tax funds to a political party.

Four special sessions of the Texas Legislature in 1972, in an otherwise off-year with no legislative session, provoked sev-

³³cf. Presidential Election Campaign Act makes statutory provision for limited reimbursement to minority parties.

³⁴380 U. S. 89.

³⁵380 U. S. at 94.

eral unconstitutional eruptions, not the least of which was the (McKool-Stroud) Primary Financing Law of 1972.³⁶ This Court struck down³⁷ the horrendous filing fees³⁸ which had long served the Democratic establishment as the exclusionary bar against unorthodox candidates. During the Second Special Session in March, 1972, after the close of the filings by candidates for nomination under party labels and the alignment of political power evidenced by such filing, the Democratic-controlled Legislature rewarded the Party faithful with the Primary Financing Law to adequately compensate those participating in the Republican and Democratic party primaries.³⁹ In February, the American Party, Raza Unida Party, Texas New Party, and Texas Socialist Workers Party had filed with the Secretary of State their certified lists of candidates for nomination under party label.⁴⁰ The (Democratic) Party promptly responded by statutorily confirming its control by the enactment of the Primary Financing Law. The only notable difference in the Primary Financing Law from filing fees is the magnitude of the expenditure of public tax funds to the Democratic and Republican political parties.⁴¹

³⁶V.A.C.S. Election Art. 13.08 c-1 Appendix A. p. A-8.

³⁷Bullock v. Carter, 405 U. S. 134, and later Johnston v. Luna (D. C. N.D. Tex. 1972) 338 F. Supp. 335, striking down yet another unconstitutional filing fee Act of the Texas Legislature. (V.A.C.S. Election Code, Art. 13.08 (5) thru (7), of First Special Session 1972.

³⁸Art. 13.07a, 13.08, 13.08a, 13.15 and 13.16 of the Texas Election Code Ann. (1967).

³⁹V.A.C.S. Election Art. 13.08 c-1;

⁴⁰V.A.C.S. Election Art. 13.12 (3) required filing by all candidates to be certified to the Secretary of State in February.

⁴¹V.A.C.S. Election Art. 13.08 c-1 (4) (a) attempted to adequately finance the Republican and Democratic primaries by the appropriation of \$2,150,000.00 but the actual cost submitted to the Fourth Special Session of the Legislature (1972) required additional appro-

A. The withholding of nominating financing from minority parties is invidious discrimination in direct proportion to the granting of financing to opposing political parties.

The mechanism of party primary elections is the creature of the state legislative choice and hence is "state action" within the meaning of the Fourteenth Amendment.⁴² This same election code which "forced"⁴³ the Republican and Democratic parties to hold party primaries also "forced"⁴⁴ extraordinary costs on minority parties.⁴⁵ Therefore it follows that once the State undertook paying for the opportunity of the Democrats and Republicans to participate in the nominating process⁴⁶ then the State cannot discriminate against all other voters by imposing the costs of nomination directly on those voters.⁴⁷

priations exceeding a total of \$3,000,000.00 to finance on a cost-plus basis the first and second (run-off) Democratic primaries and the first and second (run-off) Republican primaries; which \$3,000,000.00 is in addition to the time and money spent by the governmental agencies such as the County Clerk in holding of absentee balloting and receiving certification of filing for county-wide offices and the certification of the votes effecting nomination.

⁴²Gray v. Sanders, 372 U. S. 368.

⁴³V.A.C.S. Elections Art. 13.02.

⁴⁴V.A.C.S. Elections Art. 13:45 (2)

⁴⁵The statutorily imposed costs of the sworn registration at the conventions supplemented by notarized petitions is easily estimated considering 23,000 signatures or 12,000 sheets printed for 20 signatures each, including the name, address, registration number and date, together with the oath and multiple notary certificate at the statutory notary fee (V.A.C.S. Art. 3945 requiring charge for affixing notary) of 50¢ per signature; costs of distribution and costs of collecting and filing of petitions.

⁴⁶The nominating process is an integral part of the electoral process and must pass constitutional muster against the charges of discrimination or abridgement of the right to vote; Moore v. Ogilvie, 394 U. S. 814, 818.

⁴⁷The placing of even a minimal price on the exercise of the right to vote constituted an invidious discrimination. Harper v. Virginia Board of Elections, 383 U. S. 663.

B. The Primary Financing Law finances political purpose only.

The Primary Financing Law was obviously intentional discrimination because it was an indisputable fact that only the Democratic and Republican party primaries could possibly qualify for the cost-plus 5% participation in the allotment of public tax funds which were paid directly to the political party.

The Election Code does not require any signatures on petitions by either of the major political parties who cast more than 2% (but less than 200,000 votes) of the vote for their gubernatorial candidate in the next preceding general election whether such party should determine to nominate by convention⁴⁶ or by primary election.

Furthermore, should that political party be so fortunate as to have cast more than 200,000 votes, the party-primary shall be paid for by the state to the political parties on a basis of total expenses plus 5% for the County Chairman of that political party. But, woe be to that group of new transient citizens recently transported to the State of Texas or the newly enfranchised 18 year old voters, or members of political parties in other states (which party might even in some instances constitute a major political party) *which did not have a gubernatorial candidate in Texas who received 2% of the vote in the next preceding gubernatorial election*; for in each of these instances, these political groups *if they can successfully organize on a State-wide basis at least 12 months prior to the next general election (and fulfill all other requirements)* will be required to entirely finance the nomination of any candidate and then

⁴⁶V.A.C.S. Election Art 13.45 (1) Parties receiving more than two percent of vote for governor but less than 200,000.

will be required to furnish a minimum number of notarized signatures to petitions to compel the names of the nominees to appear on the general election ballot. The exclusionary concept of the Texas Election Code is thus financially re-dedicated to the control by the Democratic Party. The Primary Financing Law of 1972 is analagous to the unconstitutional statutory filing-fee system which denied equal protection of the laws because without providing a reasonable alternative means of access to the ballot, it utilized the criterion of the ability to pay as a condition to having the candidate's names placed on the ballot in the nominating procedure.⁴⁹

A citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. A state law authorizing multi-million dollar payments to preferred political parties and withholding all payments from opposing political parties unreasonably restricts the right to vote by granting the right to vote to some citizens and denying the franchise to other citizens who desire to vote for a candidate of the "other" party. This unreasonable burden on the right to vote is constitutionally impermissible.⁵⁰

The statutory requirements for a minority party to nominate by convention with supplemental petitions were additionally burdened by the resulting discriminatory payment from public tax funds to the Democratic political party and the Republican political party. This use of public tax funds was not for any state reasonable use. This cost plus primary payment authorized by the Primary Financing Law was a direct reward to the party faithful insuring their participation in the Democratic or

⁴⁹Bullock v. Carter, 405 U. S. 134.

⁵⁰Dunn v. Blumstein, 405 U. S. 330.

Republican party primaries. The absence of provision for disbursements through governmental channels for all party nominating procedures evidences the invidious discrimination of direct payment to those registering as Democrat or Republican by participation in the party primary. This obvious, capricious and invidious use of public tax funds to encourage political party participation and to exclude minority parties is challenged by Appellant as violative of the due process and equal protection clauses of the Fourteenth Amendment.

CONCLUSION

Appellant urges the Court to reverse the decision of the lower Court and find V.A.C.S. Election Art. 13.45 to be unconstitutional in its entirety and to enjoin the State of Texas from the enforcement of the requirements of Art. 13.45 against minority parties. Appellant further urges the Court to find V.A.C.S. Election Art. 13.08 c-1 known as the [McKool-Stroud] Primary Financing Law of 1972 to be unconstitutional; and that the State of Texas be ordered to demand the immediate repayment of all state tax funds to the Comptroller of the State of Texas by the Democratic political party and by the Republican political party.

Respectfully submitted,

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of Texas.*

CERTIFICATE OF SERVICE

I, GLORIA TANNER SVANAS, a member of the Bar of the Supreme Court of the United States and the attorney for the AMERICAN PARTY OF TEXAS, Appellant herein, hereby certify that on the 19th day of April, 1973, I have mailed three copies of the foregoing Brief of Appellant to Counsel at the following addresses: The Honorable John Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorney for Appellee, State of Texas; Mr. Robert Hainsworth, 3710 Holman, Houston, Texas 77004, attorney for Appellant, Robert Hainsworth; Mr. Michael Anthony Maness, Seventh Floor, 711 Main Street, Houston, Texas 77002, attorney for Appellant, Texas New Party and Texas Socialist Workers Party; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas, 76700, attorney for Appellant, Laurel N. Dunn.

I certify that all parties required to be served have been served.

Gloria Tanner Svanas

APPENDIX

APPENDIX A

**AMENDMENTS TO THE UNITED STATES
CONSTITUTION**

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vol. 9 Vernon's Ann. Civ. St. Election Code

Art. 13.12 Application for place on ballot; filing; deadline; extension; withdrawal; notice

The application to have the name of any person affiliating with any party placed on the official ballot for a general primary as a candidate for the nomination of such party for any office for which a nomination may be made at such primary shall be governed by the following.

* * * * *

2. The application shall be filed with the state chairman

in the case of statewide offices, with the county chairman of each county which is included wholly or partially within the district in the case of district offices, and with the county chairman of the particular county in the case of county and precinct offices; provided, however, that applications of candidates for justice of the Court of Civil Appeals shall be filed with the state chairman. Except as provided in Paragraph 2a of this section, the application shall be filed not later than 6 p.m. on the first Monday in February preceding such primary. Subsec. 2 amended by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967; Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

2a. The filing deadline stated in Paragraph 2 of this section shall be extended for the particular party primary and office involved, as provided in this paragraph: (i) if between the fifth day preceding the first Monday in February and the 30th day preceding the general primary, both dates included, any candidate for an office dies, if the candidate had complied with all prerequisites for having his name placed on the ballot which he was required to perform by the date of his death; (ii) if between the first Monday in February and the 30th day preceding the general primary, both dates included, any candidate who is seeking nomination to an office which he then holds withdraws or is declared ineligible for election to that office; or (iii) if between the first Monday in February and the 30th day preceding the general primary, both dates included, the only candidate who has filed for a particular office in the primary of that party withdraws or is declared ineligible. In the enumerated circumstances, the name of the deceased, withdrawn, or ineligible candidate shall not be printed on the ballot, and applications for that party's nomination for that office may be filed not later than 6 p.m. on the 15th day following the death, withdrawal, or declaration of ineligibility of the candidate; pro-

vided, however, that where the death, withdrawal, or declaration of ineligibility occurs less than 15 days before the 25th day preceding the primary, the deadline for filing shall be 6 p.m. on the 25th day preceding the primary. Notwithstanding the provisions of Paragraph 2b of this section, an application which is not received by the chairman until after 6 p.m. on the 25th day shall not be timely, and applications mailed but not actually received by that time shall not be accepted for filing. Further, notwithstanding the provisions of Section 186¹ or any other provision of this code, the full amount of the assessment or filing fee must be received by the chairman not later than 6 p.m. on the 25th day.

Subsec. 2a added by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967. Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

2b. Except as otherwise provided in Paragraph 2a, an application filed under either Paragraph 2 or Paragraph 2a of this section shall be considered filed if sent to the proper chairman at his post-office address by registered or certified mail from any point in this state not later than the day before the filing deadline, as shown by the postmark. Any application not received by the chairman before the deadline does not comply with this law unless it has been mailed by registered or certified mail as herein provided, and it shall not be sufficient to send the application by any other type of mail unless it is delivered before the deadline.

2c. A candidate may withdraw by filing with the chairman or chairmen with whom his application was filed, a signed request, duly acknowledged by him, that his name not be printed on the primary ballot. Whenever a filing period is extended by the death, withdrawal, or ineligibility of a candidate, each coun-

¹ Article 13.08.

ty chairman with whom the candidate's application was filed shall give notice of the opening of the filing and of the deadline to file by mailing or delivering a news release within 48 hours after his first knowledge of the death, withdrawal, or ineligibility, to each newspaper, as defined in Article 28a, Vernon's Texas Civil Statutes, as amended, which is published in the county. Where the application was filed with the state chairman, he shall give notice in like manner by mailing or delivering the release to at least three daily newspapers which maintain news representatives in the State Capitol. The failure of a county chairman or state chairman to comply with this requirement shall be ground for his removal from office by the committee of which he is chairman.

2d. A candidate shall not be permitted to withdraw during the period of 20 days preceding the general primary. If after the 30th day preceding the general primary a candidate dies or an incumbent or an unopposed candidate withdraws or is declared ineligible, the procedure detailed in Section 104 of this code² shall be followed. Except as provided in that section, the name of a deceased, withdrawn, or ineligible candidate shall not be printed on the ballot.

Subsecs. 2b-2d added by Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

3. Within ten days after the first Monday in February, the state chairman shall file with the Secretary of State, and each county chairman shall file with the county clerk of his county a list of the names of all candidates, arranged by office for which nomination is sought, whose applications have been timely received. In like manner each chairman shall file, within three days after any extended filing deadline under Paragraph 2a of this section, a supplemental list of candidates whose

² Article 8.22.

applications were timely received after the original list was prepared. Each county chairman shall forward to the chairman of the state executive committee a copy of each list which he files with the county clerk.

Subsec. 3 amended by Acts 1967, 60th Leg., p. 1913, ch. 723, § 45, eff. Aug. 28, 1967.

Vol. 9 Vernon's Ann. Civ. St. Election Code (1972-73 Suppl. pages 149-150) Texas Election Code.

Art. 13.45 Nominations by parties under two hundred thousand votes

Subdivision 1. Parties receiving more than two percent of vote for governor. Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in Sections 224 and 225 of this code.³

Subdivision 2. Parties receiving less than two percent of vote for governor. Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in Sections 224 and 225,⁴ but in order to have the names of its

⁴ Articles 13.47 and 13.48.

³ Articles 13.47 and 13.48.

nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with Sections 222a and 224 of this code,⁵ signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election. The address and registration certificate number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: "I know the contents of the foregoing petition, requesting that the names of the nominees of the Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party." The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to

⁵ Articles 13.45a and 13.47.

apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by Section 181 of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than \$100 or more than \$500.

The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

At the time the secretary of state makes his certifications to the county clerks as provided in Section 3 of this code,* he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements."

Amended by Acts 1967, 60th Leg., p. 1921, ch. 723, § 59, eff. Aug. 28, 1967, Subd. 2 amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 35, eff. Sept. 1, 1969.

Vol. 9 Vernon's Ann. Civ. St. Election Code (1972-73 Suppl. pages 170-171) Texas Election Code

Art. 13.47 Conventions of parties not required to hold primary

Political parties which are not required by law to make nominations by primary election may make nominations by conventions as provided herein.

Nominations for statewide offices shall be made at a state convention, which shall be held on the second Saturday in June

* Article 1.03.

of the election year, and which shall be composed of delegates selected in the various counties at county conventions held on the second Saturday in May. The county conventions shall be composed of delegates from the genreal election precincts of such counties elected therein at precinct conventions held in such precinct on the first Saturday in May.

Nominations for district offices of districts composed of more than one county or part thereof shall be made at district conventions held on the third Saturday in May of the election year, composed of delegates elected thereto from the counties having territory within the district, at the county conventions held on the second Saturday in May.

Nominations for county and precinct offices and for district offices of districts composed of only one county or part of one county shall be made at the county conventions held on the second Saturday in May.

The state executive committee of each party shall determine the formula by which the number of delegates to the county, district, and state conventions of that party shall be governed, and shall also formulate such rules as it deems desirable with respect to participation of delegates at a county convention in the nomination of candidates for precinct offices and for district offices of districts composed of only a part of the county, and in the election of delegates to a district convention where only a part of the county is included in the district.

Amended by Acts 1967, 60th Leg., p. 1923, ch. 723, § 61, eff. Aug. 28, 1967.

Vol. 9 Vernon's Ann. Civ. St. Election Code (1972-73 Suppl. pages 173-174) Texas Election Code

Art. 13.08c—1. Primary financing law of 1972

Section 1. *Purpose.* The invalidation by federal court deci-

sions of the statutory method of financing primary elections in this State necessitates legislative action to provide a solution to the impasse facing political parties which cast more than 200,000 votes for Governor in the last preceding general election, in that the existing law requires that their nominations for the general election be made in primary elections but they are left without adequate means to finance the primaries. The purpose of this Act is to provide a temporary solution to the impasse by enacting provisions relating to the conduct and financing of primary elections for the year 1972.

Sec. 2. *Conduct of the Primary Elections.* Nominations for the general election to be held on November 7, 1972, shall be made in the manner provided in the Texas Election Code. The primary elections held by a political party pursuant to Sections 180 and 181, Texas Election Code (Articles 13.02 and 13.03, Vernon's Texas Election Code), shall be conducted through the party's state executive committee and county executive committees in accordance with the procedures detailed in the Election Code, with the following modifications and clarifications:

(1) In order for a candidate to have his name placed on the ballot for the general primary election, he must have either paid a filing fee or filed a nominating petition in compliance with the directives issued by the Secretary of State following the decision in *Johnston v. Bullock, et al.*, CA 3-5373-C, United States District Court for the Northern District of Texas, Dallas Division,⁷ which declared the statutory system of fees and assessments to be invalid.

(2) The fees paid to the county chairman pursuant to the directives of the Secretary of State and any contributions made to the county chairman or the county executive committee for the specific purpose of helping defray the costs of the primary

⁷ See *Johnston v. Luna* (D.C. 1972) 338 F. Supp. 355.

elections shall be deposited to the credit of the primary fund referred to in Section 196 (Article 13.18) of the Election Code and shall be applied to payment of the costs of the primary elections. The county chairman and the committee may also use any other available funds toward defraying the costs. The remaining costs incurred after the effective date of this Act shall be borne by the State out of the appropriation made for that purpose in Section 4 of this Act, in accordance with the procedures outlined in Section 3 of this Act, or out of supplemental appropriations made at subsequent sessions of the Legislature if the original appropriation is insufficient.

(3) In each county in which voting machines or an electronic voting system has been adopted, the county Commissioners Court shall permit the county-owned voting machines or voting equipment to be used for the primary elections, including the conduct of absentee voting for the elections, at a charge for use at each election not exceeding \$16 per unit for voting machines adopted under Section 79 of the Election Code,⁸ and not exceeding \$3 per unit for voting equipment adopted under Section 80 of the Election Code.⁹ The maximum amount fixed in this Act includes the lease price for use of the unit, and also the charge for its preparation and maintenance if the county provides these services. The county is entitled to reimbursement for the cost of transporting the machines or equipment to and from the polling places if the county provides this service. Where voting is by an electronic voting system, the county may not charge for use of county-owned automatic tabulating equipment at the central counting station, but all actual expenditures incidental to operation of the central counting station in counting the ballots are payable out of the primary fund.

⁸ Article 7.14.

⁹ Article 7.15.

(4) All expenses of the county clerk in conducting absentee voting in the primary elections, including the employment of additional deputies where necessary, shall be paid by the county. A county is not entitled to reimbursement for any expenditure of county funds in connection with the conduct of absentee voting or any other services rendered by the county clerk in the primary elections, except for voting machines and/or punch-card units used in conducting the absentee voting.

(5) The total combined compensation paid to the county chairman and the secretary of the county executive committee (where the committee has named a secretary) and to any office personnel employed to assist in the performance of the duties placed upon the chairman, the secretary, and the members of the county executive committee shall not exceed five percent of the amount actually spent in holding the primary elections for the year, exclusive of the compensation paid to these officers and employees.

(6) Charges for office expenses shall not be allowed for a period extending beyond the 10th day after the date of the last primary held by the party.

(7) The Secretary of State is authorized to promulgate uniform rules in regard to the maximum number of election clerks who may be compensated for their services at a polling place, taking into account the number of registered voters in the election precinct, the number of votes cast in the precinct in the party's primary elections in 1970, the method of voting, and other relevant factors. The Secretary of State must allow compensation for the presiding judge, alternate judge, and at least one clerk for each precinct. If the Secretary of State promulgate rules on this subject, he shall furnish a copy of the rules to each county chairman at least 10 days before the election to which the rules apply. The Secretary of State may

allow compensation for clerks employed in excess of the applicable limit set by the rules if he finds that employment of additional clerks was justified by special circumstances existing in the precinct.

(8) The county chairman is not required to file the financial report provided for in Subdivision 5 of Section 196 (Article 13.18) of the Election Code, but he shall account for the primary fund in the manner provided in Section 3 of this Act.

(9) The Secretary of State shall not approve any expenditure of state funds to any county organization that practices discrimination based on race, sex, age, creed, or national origin. The State Attorney General shall be specifically responsible for the enforcement of this section.

Sec. 3. *State Financing.* (a) As soon as possible after this Act takes effect, the Secretary of State shall obtain from each county chairman of each political party in the state which is holding primary elections in 1972 a sworn itemized estimate of the costs for conducting the first primary election in his county, showing the costs incurred or to be incurred after the effective date, together with a sworn statement of the filing fees and contributions received by the chairman, for such primary election to and including the date of such sworn statement. The Secretary of State shall review the estimate and shall notify the chairman of any items which he has disallowed as unauthorized expenditures. Expenditures may be allowed only for those purposes which are properly payable out of the primary fund under existing law as established by the statutes and court decisions of this State. The Secretary of State shall subtract from the approved estimated any amount of the fees and contributions received by the chairman remaining over and above legitimate expenses incurred, before the effective date of this Act, for the conduct and financing of the Primary

Elections for the year 1972, and shall certify to the Comptroller of Public Accounts the net estimated amount which is payable out of State funds, together with the Secretary of State's calculation of three-fourths of that amount. The Comptroller forthwith shall issue a warrant to the chairman for three-fourths of the certified amount.

(b) In each county in which a runoff primary is necessary, within 10 days after the first primary the county chairman shall submit to the Secretary of State a sworn itemized estimate of the costs of the runoff primary incurred or to be incurred after the effective date of this Act. As in the case of the first primary, the Secretary of State shall notify the chairman of items which he disallows, and shall certify to the Comptroller the approved estimated amount which is payable out of State funds, together with the Secretary of State's calculation of three-fourths of that amount; and the Comptroller shall issue a warrant to the chairman for three-fourths of the certified amount.

(c) Within 20 days after the date of the runoff primary, the county chairman shall submit to the Secretary of State a sworn itemized report of the actual costs, filing fees collected and contributions received, of the primary election or elections (as the case may be) held by this party in his county, showing the costs incurred before the effective date of this Act separately from those incurred after the effective date. If the actual expenditure for an item exceeded the estimated amount, the chairman shall submit an explanation of the reason for the increased expenditure, and the Secretary of State shall allow the increase if good cause is shown. The Secretary of State shall certify to the Comptroller the difference between the total amount payable out of State funds and the amount which has already been transmitted to the chairman, and the Comptroller shall issue a warrant to the chairman in the amount certified. If

the total amount of the fees and contributions in excess of those previously expended for expenses which would have been payable if incurred after the effective date of this Act, and the payments from the State exceeds the actual expenditures incurred after the effective date of this Act, the chairman shall refund the difference to the State, in the form of a check made payable to the Secretary of State. The Secretary of State shall deposit the check in the State Treasury to the credit of the appropriation account established under Subsection (a) of Section 4 of this Act.

(d) Each county chairman shall deposit to the credit of the primary fund all warrants received by him under this section. Expenses incurred by or on behalf of the county executive committee for the conduct of the primary elections shall be paid from the primary fund, in the manner authorized by the committee.

(e) The county chairman is responsible for payment of claims for primary election expenses, and the State is not liable to any claimant for failure of the county chairman to pay a claim.

(f) The Secretary of State shall prescribe and shall furnish to the county chairmen the forms which they are to use in submitting their statements and reports to him.

(g) Wherever the word "county chairman" is used in this Act, it shall apply to the county chairman or his successor in office, and such county chairman shall not be personally liable except for the misapplication of funds.

(h) In any case in which the Secretary of State disallows an item of expenditure under Subsection (a) or (b) of this section, or refuses to allow an increase under Subsection (c) of this section, the county chairman may appeal to a district

court of Travis county by filing a petition within 20 days after the date the notification is received from the Secretary of State, and the district court shall allow such expenditures as are properly payable out of the primary fund under existing law. Any item not certified to the comptroller of public accounts for payment within 10 days after its submission to the Secretary of State may be considered disallowed for this purpose. Judicial review shall be by trial de novo as are appeals from the justice court to the county court.

Sec. 4. Appropriations. (a) There is appropriated from the general revenue fund to the office of the Secretary of State the sum of \$2,150,000 for the purpose of making payments to county chairmen as provided in Sections 2 and 3 of this Act. All refunds deposited to the credit of this appropriation account are appropriated for the same purpose as designated for the original appropriation.

(b) To enable the Secretary of State to finance the additional duties which this Act places upon him, three is appropriated from the general revenue fund to the office of the Secretary of State the sum of \$20,000, which shall be placed to the credit of the appropriation accounts established under Items 6 and 8 of the appropriation made by Chapter 1047, Acts of the 62nd Legislature, Regular Session, 1971, to the office of the Secretary of State for the fiscal year ending August 31, 1972, in the following amounts:

Item 6 (seasonal and part-time help)	\$ 6,000
Item 8 (consumable supplies and materials, current and recurring operating expense, etc.)	14,000

Sec. 4-A. Severability. If any provision of this Act or the applicable thereof to any person or circumstance is held in-

valid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Acts 1972, 62nd Leg., 2nd C.S., p., ch. 2, §§ 1 to 4-A, eff. April 4, 1972.

Vol. 9 Vernon's Ann. Civ. St. Election Code (1972-73 Suppl. pages 143-146).

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-325

American Party of Texas, et al.,

v.

Bob Bullock, Secretary of State of Texas.
Application for Temporary Restraining Order.

[October 5, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The American Party, seeking to get on the Texas ballot for this year's election, brought an action which asked a three-judge federal court to hold provisions of the Texas election laws unconstitutional.

Texas has four methods of nominating candidates.

First, those whose gubernatorial candidates polled more than 200,000 votes in the last general election may be nominated through primaries. Election Code, Art. 13.02. Second, those whose party candidates polled less than 200,000 votes but more than 2% of the total votes cast for governor may be nominated by primaries or by nominating conventions. Third, those whose party candidates polled less than 2% of the total gubernatorial vote and those whose party did not have a nominee for governor on the last general election may be nominated by convention only or by fulfilling the requirements of Art. 13.45(2) of the Election Code. Fourth, nonpartisan independent candidates may appear on the ballot after meeting the requirements of Art. 13.50 of the Election Code.

The American Party falls in the third category. In order

to gets its nominee printed on the ballot it must meet the following requirements:

It must by the previous September declare its intention to nominate by convention. That entails a state-wide party organization with an executive committee. It also requires the filing with the Secretary of State by February of the names of the candidates; it requires the filing of party rules by March. It requires the holding of precinct conventions on the day of the primary and the holding of county conventions the following week and a state convention on a day certain.

The American Party must in addition do the following:

(1) It must furnish a list of participants in each precinct convention with the names, addresses and registration certificate numbers of qualified voters attending such conventions. The names on the list must total at least 1% of the total votes cast for governor at the last preceding general election.

(2) If the number of qualified voters attending the precinct conventions is less than 1%, there must be filed a petition requesting that the names of the nominees be printed on the election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least 1% of the total votes cast for governor in the last election.

(3) No person who during the voting year voted at any primary election or participated in any convention of any other party may attend the minority party convention or sign the petition. If he does, he is subject to criminal penalties.

(4) The petition may not be circulated until after the date set for the holding of the major parties primaries. Signatures must be certified before 20 days after the date of the party's convention, which in 1972 gave it approximately 53 days to gather signatures.

(5) Each person who signs a petition must be administered an oath before a notary public at the time he signs.

This election scheme is not as severe or oppressive as the one we condemned in *Williams v. Rhodes*, 393 U.S. 23; nor is it as benign as the one approved in *Jenness v. Fortson*, 403 U.S. 431.

While Texas requires only 1% of the voters for governor to endorse the new party, that requirement must be met by obtaining signatures of those attending precinct conventions, supplemented, if need be, by signatures obtained after the primaries. But all cross-over signing is barred and it is supported by criminal sanctions. Moreover, the supplemental signatures can be obtained only after the major parties have held their primaries. And only a 55-day period is available for obtaining the necessary signatures.

While the requirement of 1% of the total vote for governor may be less than Georgia's requirement of 5% of those eligible to vote in the last election for the filling of the office the candidate is seeking, the Texas machinery for launching a minority party is almost as cumbersome and involved as the one we struck down in *Williams v. Rhodes*.

The minority party must be state-wide even though its appeal may be essentially to urban voters or to rural voters, as the case may be. That requirement did not appear in Georgia's scheme.

In Georgia, 180 days was allowed for circulating a nominating petition; in Texas, less than 60 days.

In Georgia the minority party had to meet the same deadline as did candidates running in the primaries of the regular parties. In Texas the regular parties first have their primaries; only then can a minority party solicit signatures for its can-

didates. Moreover, no one who voted in a primary is eligible to sign the petition for the minority party.

The minority party therefore must draw its support from the ranks of those who were either unwilling or unable to vote in the primaries of the established parties.

The minority party therefore cannot compete with the regular parties; it must be content with the left-overs to get on the ballot.

We said in *Jenness v. Fortson, supra*, at 438, "Georgia's election laws, unlike Ohio's, do not operate to freeze the status quo." Texas, though not as severe as Ohio, works in that direction. It therefore seems to me, at least *prima facie*, to impose an invidious discrimination on the unorthodox political group.

Perhaps full argument would dispel these doubts. But they are so strong that I would grant the requested stay so that candidates for the American Party may get on the Texas ballot for next month's presidential election. To do so it must be certified by the Secretary no later than October 6th. We cannot possibly decide the merits by that date. But if the American Party is on the ballot, the voting and associational rights which we have been alert to protect will be honored; and if meanwhile the merits are reached and we affirm the three-judge court, holding the Texas scheme constitutional, the ballots will not be counted. That was the way Justice Black avoided the dilemma in a Florida case; and I would follow his course here.*

* See *Davis v. Adams*, 400 U. S. 1203.

APPENDIX C**Art. 13.45 Nominations by parties under 200,000 votes**

Any political party whose nominee for Governor in the last preceding general election received less than two hundred thousand votes, or any new party, or any previously existing party which did not have a nominee for Governor in the last preceding general election, may nominate candidates for the general election:

(1) by primary elections held in accordance with the rules provided in this Code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or

(2) by nominating such candidates for the general election in conventions as provided in Sections 224 and 225 of this Code;¹ provided, however, that if the convention system be used, then the party must comply with the following qualifications for nomination:

(a) Such party must hold a state convention at the time and under conditions prescribed by law, composed of delegates from county conventions held in accordance with the law.

(b) It shall not be necessary that county conventions whose delegates comprise the state convention be held in all counties of the state, but such conventions must be held in not less than twenty counties comprising in the aggregate not less than twenty per cent of the population of the state.

(c) The chairman of the state executive committee of the party shall certify under oath to the Secretary of State that the conditions of this section have been complied with. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 222; as amended Acts 1959, 56th Leg., p. 335, ch. 165, § 11; Acts 1963, 58th Leg., p. 1017, ch. 424, § 102.

¹ Articles 13.47 and 13.48.

MAY 5 1973

ROBERT W. HAINSWORTH, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL., *Appellants*

v.

BOB BULLOCK, *Appellee*

NO. 72-942

ROBERT HAINSWORTH, *Appellant*

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

On Appeal From The United States District Court
For The Western District of Texas

BRIEF OF APPELLANT ON THE MERITS

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CHAPTER II

THE GROWTH OF THE UNITED STATES

IN THE
Supreme Court of the United States

October Term, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL., *Appellants*

v.

BOB BULLOCK, *Appellee*

NO. 72-942

ROBERT HAINSWORTH, *Appellant*

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

**On Appeal From The United States District Court
For The Western District of Texas**

BRIEF OF APPELLANT ON THE MERITS

TO THE HONORABLE SUPREME COURT:

The brief of the appellant, Robert Hainsworth, on the merits, in the above consolidated cases, follows:

REFERENCE TO OPINION BELOW

There was no individual opinion rendered by the Three-Judge Court in this case, but the Court below referred in its Order Denying Motion For Rehearing, to the opinion of the Court rendered in the consolidated cases of *Raza Unida Party, et al. v. Bob Bullock, et al.*, which is reported in 349 Fed. Supp. 1272; and the reference was "For the reasons fully discussed in Part III and Part VII of our opinion in *Raza Unida Party v. Bullock, supra*, and based upon the authorities cited therein, this Court found that Article 13.50 of the Texas Election Code served a compelling state interest and was not violative of Equal Protection as applied to Plaintiff Robert W. Hainsworth. Memorandum Order and Judgment to this effect was entered on September 19, 1972."

GROUND ON WHICH JURISDICTION INVOKED

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A., Sections 1253, 2281, and 2101 (B).

The Memorandum Order and Judgment of the United States District Court was dated and entered on the 19th day of September, 1972. The Order Denying Motion For Rehearing was dated and entered on the 3rd day of October, 1972. The Notice of Appeal to this Court was filed in the United States District Court for the Western District of Texas, Austin Division on November 2, 1972. The Record and Jurisdictional Statement was docketed in this Court on December 30, 1972- as Case No. 72-942. This Court noted probable jurisdiction on March 5, 1973, and consolidated this case with several other cases.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is United States Constitution, Amendment XIV, Section 1, and the State Statute involved is Article 13.50 of the Texas Election Code, V.A.T.S., Vol. 9, pp. 504, 505.

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 13.50 Non-partisan and independent candidates

The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the last preceding general election, and shall be addressed to the county judge.

Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of

anyone for an office for which a nomination was made at either such primary election.

The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office.

QUESTIONS PRESENTED FOR REVIEW

1. Does the State of Texas place a heavier burden on Independent candidates to get on the ballot than on other major political party candidates?
2. Whether Art. 13.50 Texas Election Code, V.A.T.S., violates the Constitution of the United States, Section 1, Amendment XIV, in such Article's provisions and requirements for an independent candidate to get name on general election ballot?
3. What is an appropriate measuring rod and guidelines for the State of Texas to observe in providing by

State Statute how an independent candidate can get his name on the general election ballot, within the framework of all constitutional safeguards?

CONCISE STATEMENT OF CASE

The petitioner in the Court below, and the appellant in the Supreme Court, endeavored to become an independent candidate for the office of State Representative, District 86, Harris County, Texas, in the general election held on November 7, 1972.

That the application to get the name of the petitioner on the ballot as an independent candidate was begun to be circulated on June 5, 1972, and within 30 days after the second primary day, on July 3, 1972, the petitioner brought the application to the office of the Secretary of State, with the signatures notarized as required by the Texas Election Code. That the petitioner met all qualifications to become an independent candidate for State Representative, District 86, except that he did not have signatures of qualified voters to his application numbering five per cent of the entire vote cast for Governor in such district at the last general election, nor five hundred signatures to his application. But the petitioner did have over three hundred signatures. That the petitioner presented a written request for an extension of time in which to obtain more signatures to his application, to the office of Secretary of State. (A. 36). (And see Exhibit "A"). (A. 45). That the petitioner was advised that the Secretary of State could not extend the time, and that the only way an extension could be secured was by petition to the Court and the obtaining of a Court Order. That the petitioner had on prior occasions endeavored to get his name on the ballot as an independent candidate, but did not

obtain enough signatures to his application, on prior occasions. That on July 3, 1972, the petitioner left for filing the application to get his name on the ballot as an independent candidate, together with his Consent to Become A Candidate, in the office of the Secretary of State. (A. 36).

Thereafter, the petitioner filed a verified Petition for Preliminary Injunction in the United States District Court for the Western District of Texas, challenging the constitutionality of Art 13.50 V.A.T.S. (A. 33-45).

That the Defendant in answer filed a Motion To Dismiss said action on several grounds (A. 46-49).

The Three-Judge Court in its Memorandum Order and Judgment found that Art. 13.50 served a compelling state interest and is not violative of Equal Protection as applied to this plaintiff. All relief sought by plaintiff was denied and the defendant's Motion, treated as one for summary judgment is granted. Petitioner filed a Motion for Rehearing. And the Three-Judge Court denied plaintiff's Motion for Rehearing, in its Order dated and entered the 3rd day of October, 1972.

THE ARGUMENT

1.

DOES THE STATE OF TEXAS PLACE A HEAVIER BURDEN ON INDEPENDENT CANDIDATES TO GET ON THE BALLOT THAN ON OTHER MAJOR POLITICAL PARTY CANDIDATES?

Some of the burdens, restrictions and impediments that are placed upon non-partisan and independent candidates by Art. 13.50, are set forth below:

I. Discriminations between district non-partisan or independent candidates: The per cent or number required of some district independent candidates is smaller than that required of others; three per cent for some, five per cent for others, dependent upon whether from one county or part of one county, or from more than one county. Also, this difference is noted: an independent candidate for the United States House of Representatives, and an independent candidate for State Representative in Harris County, Texas. That there are four Congressional Representative Districts in Harris County, and part of a fifth Congressional District. That there are twenty-three State Representative Districts and part of a twenty-fourth State Representative District. That with 150 State House seats in the State Legislature, and with the 1970 U. S. Census of population, each State Representative District has about 74,000 or about 75,000 people, and each U. S. Congressional District in Harris County, has about 400,000 people, yet both candidates have to get five per cent of the vote cast for Governor in the last preceding general election in the respective districts, to their nominating petition, but not to exceed 500 signatures. That 500 signatures to a nominating petition for a Congressional candidate is considered a reasonable number.

2. An oath to the Application is required: By Art. 13.51, V.A.T.S.,

Art. 1351 Oath to application

To every citizen who signs such application, there shall be administered the following oath, which shall be reduced to writing and attached to such application:

"I know the contents of the foregoing application; I have not participated in the general primary election or the runoff primary election of any party which has nominated, at either such election, a candidate for the office for which I desire _____ (here insert the name of the candidate) to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force and have signed the above application of my own free will." One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered.

The oath requirement and the accompanying Notary Public or Notary Publics, adds to the cost of becoming an independent candidate, and requiring a price to be paid to become an independent candidate. Where an individual goes to the home or office of a Notary Public to have an instrument notarized, is the notarizing worth more if the Notary Public has to go out in the streets, the highways and by-ways, here and there where a voter can be found, who has not voted in the first primary or second primary election, and who is willing to sign his or her name to such a nominating petition?

3. An independent candidate must obtain the requisite number of signatures within 30 days. 4. That one who circulates his nominating petition to get on the ballot as an independent candidate can only begin to circulate such nominating petition after the first and second run-off primary election of both major political parties, and the only voters eligible to sign such petition are those who did not vote in either primary.

WHETHER ART. 13.50 TEXAS ELECTION CODE, V.A.T.S., VIOLATES THE CONSTITUTION OF THE UNITED STATES, SECTION 1, AMENDMENT XIV, IN SUCH ARTICLE'S PROVISIONS AND REQUIREMENTS FOR AN INDEPENDENT CANDIDATE TO GET NAME ON GENERAL ELECTION BALLOT?

One of the points in this case is candidacy, and the right of voters to vote for an independent candidate. Another important question to be considered in this case is whether the burdens, impediments and restrictions that are alleged to be placed upon independent candidates by Art. 13.50 of the Texas Election Code, are to be tested by the traditional "rational basis" test, or by the more strict and exacting "compelling State interest" standard. *Manson v. Edwards*, 345 F.Supp. 719, U.S.D.C. East Mich. (1972), and citing *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). That the lower Court decided to apply the "compelling state interest" test. The compelling interest test is usually applied where there is an infringement on a fundamental right, such as the right to vote. Where the State in some degree denies a candidacy, does that deny to some citizens the opportunity to vote for the candidate of their choice?

There is a question in this case that is similar to the one that was stated in *Bullock v. Carter*, 405 U.S. 134 (1972), namely, Whether the statute creates barriers to candidates's access to the general election ballot from whom voters might choose? And a related question is, What is the nature and extent of such candidate restrictions on voters? To try and answer the first question, the answer is "Yes", Art. 13.50 creates barriers to ac-

cess to the general election ballot by independent candidates. The answer to the second question is that it denies to some voters the opportunity to vote for the candidate of their choice in the general election.

In the case of *Evans v. Cornman*, 398 U.S. 419, 26 L.Ed.2d 370, 90 S.Ct. 1752 (1970) the Court stated at page 422, "And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." And also, "* * * once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665, 16 L.Ed. 2d 169, 171, 86 S.Ct. 1079 (1966); see *Williams v. Rhodes*, 393 U.S. 23, 29, 21 L. Ed. 24, 30, 89 S.Ct. 5 (1968). And at 398 U.S. 423, the Court speaks of "* * * 'fencing out' from the franchise a sector of the population" * * *. And this prompts the thought of whether by the Texas Anti-raiding statute, the State of Texas has fenced off for the major political parties and from the non-partisan or independent candidates all of those voters who participate in the first and second primary election, so that those voters are not eligible to sign the nominating petition of an independent candidate. (Tr. 55-56).

That where an independent candidate may in some instances get on the general election ballot, and even if in some instances the route of the independent candidate to the general election ballot may not be as difficult as for the major political party candidate, still, the independent candidate has a hard row to hoe to win a general election contest with a major party candidate (Tr. 57-59).

WHAT IS AN APPROPRIATE MEASURING ROD AND GUIDELINES FOR THE STATE OF TEXAS TO OBSERVE IN PROVIDING BY STATE STATUTE HOW AN INDEPENDENT CANDIDATE CAN GET HIS NAME ON THE GENERAL ELECTION BALLOT, WITHIN THE FRAMEWORK OF ALL CONSTITUTIONAL SAFEGUARDS?

As the Three-Judge Court said in its opinion of *Raza Unida Party v. Bullock*, 349 F.Supp. 1272, at Pages 1275 and 1276, (pertaining to those other cases with which this case is consolidated) "While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process, *Williams v. Rhodes*, 393 U.S. 23 (1968), and those on the other hand which do not, *Jenness v. Fortson*, 403 U.S. 431 (1971) this case presents a new combination which falls squarely in the middle.

Under the rules laid down for independent candidates in the case of *Jenness v. Fortson*, 403 U.S. 431, at pages 438 and 439, 29 L.Ed.2d 560, 561, it appears that Art. 13.50 V.A.T.S., Texas Election Code, is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, when applied to those who attempt to become independent candidates for a State office, in Texas, because the following provisions of the Georgia Statute pertaining to independent candidates, which had met close constitutional scrutiny were: (1) Nominating petition signed by five per cent of the number of registered voters at the last general election for the office in question; (2) The total time for

circulating the petition is 180 days; (3) A voter may sign a petition even though he has signed others; (4) a person who has voted in a party primary election is fully eligible to sign a petition; (5) No signature on a nominating petition needs to be notarized; (6) The signer of a petition is not required to state that he intends to vote for that candidate at the election.

CONCLUSION

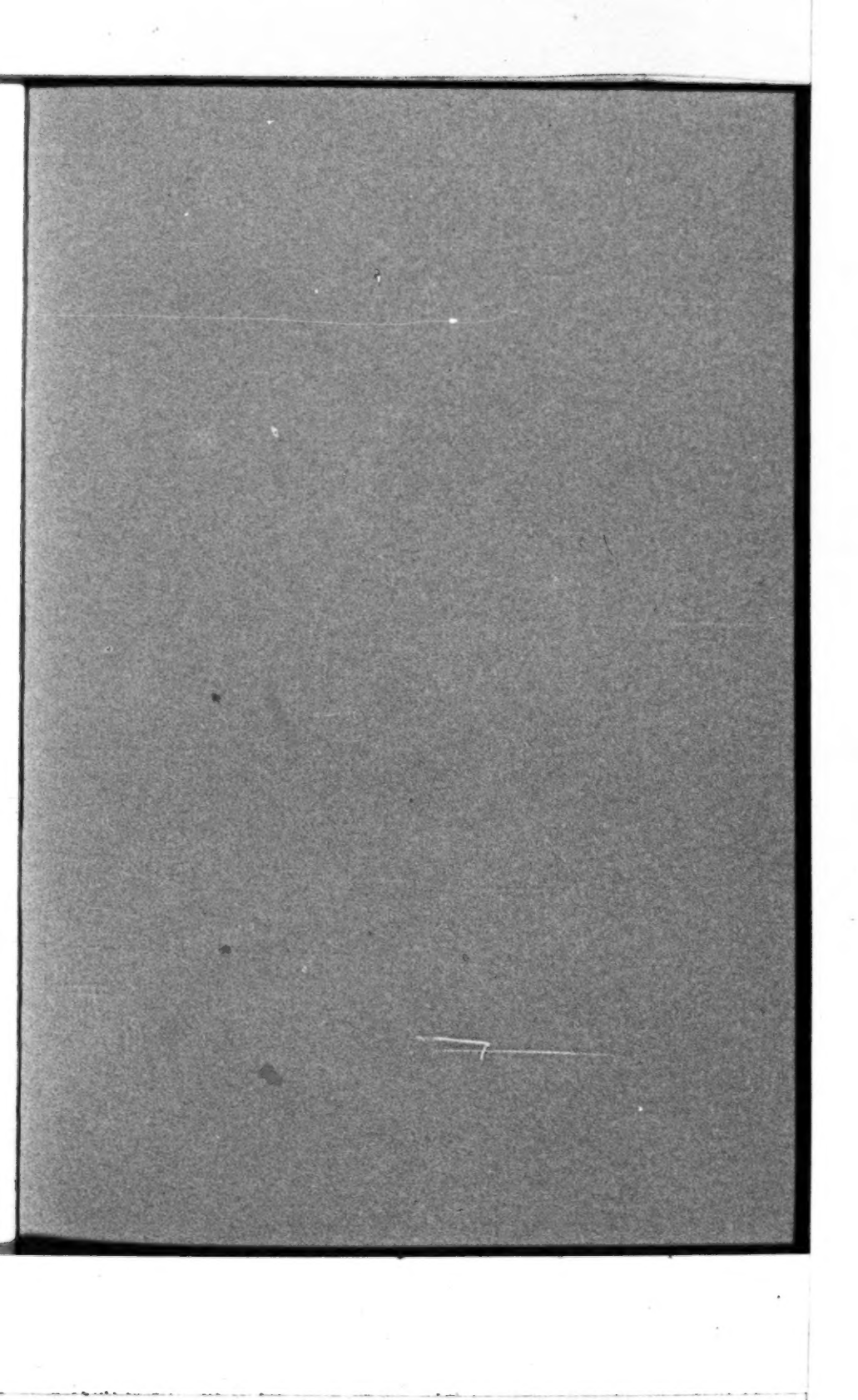
One of the principles upon which the United States of America was founded is Independence, and while Independence in itself does not merit any special favor from the State, nor should it merit any special disfavor from the State, still, it is respectfully submitted to the Court that a citizen who assays to become an independent candidate for the State Legislature or any other office, and who does meet the "compelling state interest" test of being a candidate in good faith, because of having tried diligently to attain and to accomplish the requirements of the State Statute,—(* * * "Yes, sir, I made a very good-faith attempt to get 500 signatures, I began the canvassing immediately after the second Primary date, June 5th, and canvassed up until the last day, and I obtained 322 signatures by my count, * * *." (Tr. 54)) should not be placed under too many handicaps by Texas statutory provisions to get his name on the general election ballot as an independent candidate.

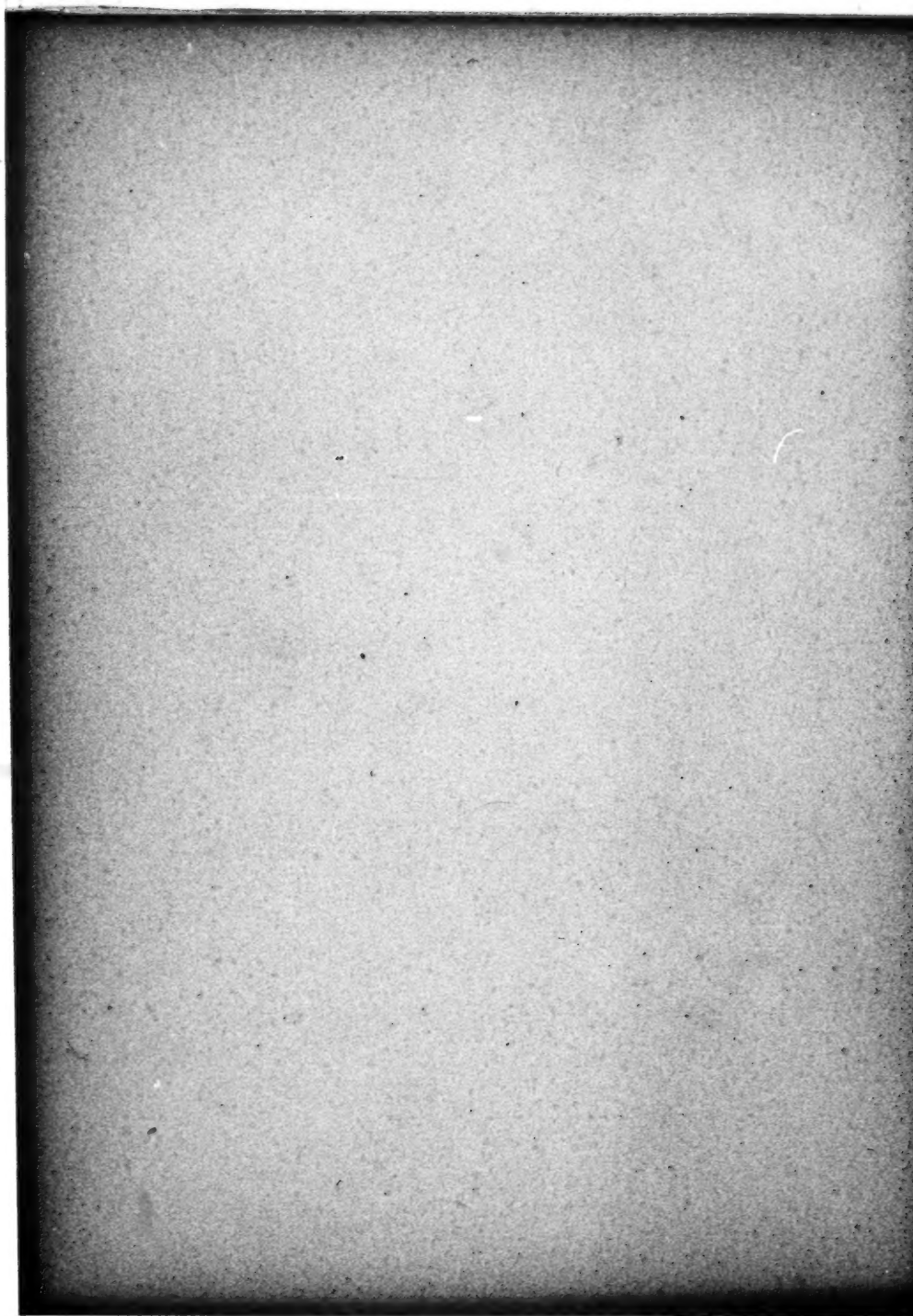
For the reasons stated above, it is respectfully submitted to the Court that the Judgment of the Lower Court be reversed, and that the Court declare Article 13.50 V.A.T.S., Texas Election Code, unconstitutional, and for

such other and further relief that the Supreme Court consider meet and just.

Respectfully submitted,

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FILE
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In the
Supreme Court of The United States
OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

Appellants,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee.

*Appeal from the United States District Court for
the Western District of Texas*

**BRIEF FOR APPELLANTS TEXAS NEW PARTY
AND TEXAS SOCIALIST WORKERS PARTY**

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May 1973

Jurisdictional Statement Filed December 15, 1972
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In the
Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

Appellants,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee.

*Appeal from the United States District Court for
the Western District of Texas*

**BRIEF FOR APPELLANTS TEXAS NEW PARTY
AND TEXAS SOCIALIST WORKERS PARTY**

OPINION BELOW

The memorandum opinion of the District Court is reported as *Raza Unida Party v. Bullock*, 349 F. Supp. 1272 (W.D. Tex., 1972) and is reproduced in the Jurisdictional Statement of the Appellants at pages 17-36.

JURISDICTION

The District Court's opinion and judgment were rendered on September 15, 1972. Timely notices of appeal were thereafter filed on behalf of the Appellants, and a consolidated Jurisdictional Statement invoking the jurisdiction of the Court

pursuant to 28 U.S.C. § 1253 was filed on December 15, 1972. The Court noted probable jurisdiction of the appeal on March 5, 1973 and consolidated the case for oral argument with No. 72-942, *Hainsworth v. Bullock*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the pertinent provisions of the Texas Election Code, Tex. Rev. Civ. Stat. Ann. Arts. 13.02, 13.03, 13.12, 13.45, 13.47, and 13.47a (1967), as amended [hereinafter cited as Texas Election Code or merely by article number] are reproduced in the Appendix at pages 44-48.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the totality of the general election ballot certification requirements imposed on minority political parties by the Texas Election Code, including provisions forcing such parties to obtain the notarized signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty, due process and equal protection guaranteed by the First and Fourteenth Amendments.

2. Whether a State election law prohibiting minority political parties from circulating nominating petitions for the general election until after the major party primary elections, and further providing that a voter who has previously participated in a major party's primary election or nominating convention is thereafter ineligible to sign a minority party nominating petition during the same election year, abridges the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

STATEMENT OF THE CASE

This is a direct appeal from a final order entered on September 15, 1972 by a Three-Judge Federal District Court, which dismissed four consolidated class actions seeking declaratory and injunctive relief against certain provisions of the Texas Election Code and related Texas election laws. The Plaintiffs were various minority political parties, their candidates for public office, individuals seeking office as independent candidates, and qualified Texas electors desiring to vote for these candidates.

The suits were instituted under the Civil Rights Acts of 1870 and 1871, 42 U.S.C. § 1981 and § 1983, the Voting Rights Act of 1965, 42 U.S.C. § 1971, and the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Because each of the four complaints sought an injunction against Texas statutes of statewide application, and because each action involved essentially identical issues and claims for basically the same relief, the Chief Judge of the United States Court of Appeals for the Fifth Circuit entered

an order on July 28, 1972, convening the statutory Three-Judge District Court prescribed by 28 U.S.C. § 2281 and consolidating the four cases for hearing and determination (R. 9, 11).

Each of the Plaintiff minority political parties (La Raza Unida, American Party of Texas, Texas New Party and Texas Socialist Workers Party) challenged the constitutionality of Art. 13.45(2) of the Texas Election Code, which sets forth the requirements which a new or minority party must meet in order to have the names of its nominees for public office printed on the State's general election ballot.¹ Under Texas law, any political party whose candidate for Governor in the last preceding general election polled at least 200,000 votes statewide is required to nominate its candidates for the succeeding general election by means of a party primary financed entirely by State funds.² A party whose candidate for Governor in the last preceding general election polled at least two per cent of the total votes cast for that office but less than 200,000 votes has the option of nominating its candidates either by means of a State-financed primary election or through party nominating conventions.³ The names of candidates nominated by

¹ The District Court dismissed the complaints of La Raza Unida and the Texas Socialist Workers Party, concluding that these Plaintiffs lacked standing because they had successfully complied with the statutory provisions in question and had been certified for a place on the general election ballot by the Texas Secretary of State on August 8, 1972. 349 F. Supp. at 1276. However, since neither the American Party nor the Texas New Party was certified because of their failure to meet the requirements imposed by Art. 13.45(2), the constitutional issues are properly before the Court for review. *Bullock v. Carter*, 405 U.S. 134, 136, n. 2, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

² Arts. 13.02, 13.03.

³ Art. 13.45(1).

political parties falling within either of these categories are automatically placed on the Texas general election ballot.

On the other hand, a party whose candidate for Governor in the last preceding general election polled less than two per cent of the total votes cast for that office, or any new party, or any previously existing party which did not nominate a candidate for Governor in the last preceding general election, *must* nominate its candidates by party conventions and *must* satisfy the conditions imposed by Art. 13.45(2) in order to have the names of its candidates printed on the general election ballot. Since none of the Plaintiff minority political parties were eligible to nominate their candidates by primary elections in 1972, and since none of them will be entitled to conduct primaries prior to the next general election in 1974, their only available alternative for having the names of their candidates printed on the general election ballot was and will be for them to comply with the requirements of Art. 13.45(2).

Art. 13.45(2) imposes upon minority political parties the following conditions and restrictions:

(i) Each minority party must hold precinct, county, district and state nominating conventions on prescribed dates which coincide with the convention and primary election dates of established parties.⁴ In addition, it must establish statewide party organizational machinery with a State executive committee and must also comply with requirements for declarations

⁴ Precinct conventions for all political parties in Texas are held on the first Saturday in May, the date on which the major party primary elections are held. County conventions are held on the second Saturday in May; District conventions on the third Saturday in May; and State conventions on the second Saturday in June. Art. 13.03, 13.47.

of candidacy in February and the filing of party rules by March.

(ii) In order to have the names of its nominees printed on the general election ballot, a minority party must submit to the Texas Secretary of State a certified list, by precinct, containing the names, street or post office addresses and voter registration certificate numbers of those individuals who participated in the party's precinct conventions. If the number of qualified voters attending the party's precinct conventions is less than one per cent of the total votes cast for Governor in the last preceding general election, the party must submit (in addition to its precinct convention attendance list) a petition signed by a sufficient number of additional qualified voters to constitute a total of at least one per cent of the total votes cast for Governor in the last preceding general election.

(iii) Every signature on a minority party's nominating petition must be signed under oath before a notary public⁵ and must be accompanied by the voter's address and voter registration certificate number.

(iv) The nominating petition may not be circulated until *after* the date on which the major party primaries are held. All signatures collected before that time are void.

(v) No person may attend a minority party's nominating convention or sign its nominating petition if he has previously voted in any primary election or participated in any other party's convention during the same election year, on pain of criminal sanctions.

⁵ Tex. Rev. Civ. Stat. Art. 3945 provides that a notary public shall receive a fee of 50 cents for "administering an oath or affirmation with certificate and seal."

(vi) No person otherwise qualified to vote may attend a minority party's nominating convention or sign its nominating petition if he is not at that time registered to vote.

(vii) The precinct convention attendance list and petition must be filed with the Texas Secretary of State within approximately 55 days⁶ following the major party primaries, which is approximately four months before the general election.

Art. 13.47a(1) of the Texas Election Code further requires that an individual seeking nomination as a minority party candidate must declare his candidacy before 6 p.m. on the first Monday in February of an election year, approximately three months before the party primaries and conventions and approximately nine months before the general election. This requirement is identical to that imposed upon prospective candidates for a major party nomination by Art. 13.12.

However, unlike the established political parties, minority parties are provided with no State financial assistance whatever to help defray the expenses of nomination and ballot certification. Moreover, minority parties are not provided with any alternative equivalent to the absentee balloting authorized in party primary elections by Art. 5.05, by means of which such parties are afforded approximately three weeks before the primaries and party conventions in which to gain electoral support from those who would otherwise be unavailable to participate.

In the 1968 Texas general election the presidential nominee of the American Party of Texas received more than 586,000

⁶ The petition must be filed within 20 days following the State conventions, which must be held on the second Saturday in June. For the 1972 election year the deadline was June 30.

votes, approximately 25 per cent of the total number of votes cast. However, since the American Party did not nominate a gubernatorial candidate for the State's 1970 general election, it was subject to all of the preceding restrictions imposed on minority parties by the Texas Election Code in order to place its nominees on the 1972 general election ballot. Anticipating its inability to comply with these restrictions, the Party filed the present action in May of 1972, seeking a declaration of the invalidity of the Texas minority party candidacy requirements and an injunction against their enforcement.

Shortly thereafter, the Texas New Party and Texas Socialist Workers Party filed a similar action challenging the application of the foregoing provisions of the Texas Election Code to either party in any future election. At approximately the same time Laurel Dunn, an independent candidate for the United States House of Representatives, filed suit in his own behalf in an effort to invalidate the Texas restrictions on independent candidacy. These three cases, together with an earlier action filed by La Raza Unida, were thereafter consolidated and tried together on September 7, 1972.

After initially determining that the fundamental nature of the political rights involved demanded "exacting scrutiny" of the challenged statutory restrictions under the First Amendment, and that the validity of the enactments under the Fourteenth Amendment depended upon whether they were necessary to accomplish a "compelling State interest", the District Court upheld the laws in question and denied all relief.⁷

⁷ Pending a determination of the merits, the District Court had temporarily restrained the Texas Secretary of State from refusing to accept any signatures gathered on nominating petitions by La Raza Unida and the American Party between June 30, 1972 and September 1, 1972. In

With respect to the organizational requirements imposed upon minority parties, the Court determined that the impedence of access to the ballot was offset by what it characterized as the "lenient" one per cent petition requirement and that the totality of the restrictions imposed were constitutionally permissible under the decisions in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971):

"Following the *Jenness* command to look to the 'totality' of the state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible." 349 F. Supp. at 1279.

With regard to the prohibition against circulation of a minority party nominating petition before the major party primary elections, the Court determined that the requirement was a legitimate exercise of State authority because advance circulation of nominating petitions might preclude an early signer from changing his mind and participating in a major party primary election or convention. This provision was also upheld as a reasonable means of reducing the likelihood that "individual voters will become confused or engage in the party process of more than one party." 349 F. Supp. at 1280.

the order of dismissal entered on September 15, the Court dissolved the restraining order and declared all such signatures to be null and void. 349 F. Supp. at 1286.

◆ The American Party then sought emergency relief from this Court in an effort to secure a position on the 1972 Texas general election ballot. Its motion for a temporary restraining order against the enforcement of Art. 13.45(2) was denied by the Court on October 5, 1972, Mr. Justice Douglas dissenting. *American Party of Texas v. Bullock*, 409 U.S. 803, 93 S. Ct. 25, 34 L. Ed. 2d 63 (1972).

The requirement that signatures on nominating petitions be notarized was approved by the District Court for want of a feasible alternative method for enforcing criminal sanctions against participation in the political activities of more than one party in any given election year.

The 55-day time restriction for collecting signatures on nominating petitions was justified on the grounds that a minority party's failure to obtain the necessary number was indicative of a lack of political support or initiative, while the time limitations regarding declarations of candidacy were upheld on the theory that they applied uniformly to majority and minority party candidates alike.

Finally, with respect to the alleged disparity resulting from absentee balloting for party primary elections and the absence of an equivalent opportunity for minority parties to secure an irrevocable electoral commitment before the primaries and conventions, the Court concluded that the "exacting scrutiny" applied to voting restrictions generally was inapplicable to absentee balloting under the decision in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) and that more traditional Fourteenth Amendment principles sanctioned the difference in treatment:

"Although the State of Texas does not offer any reasons for the lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, 'Legislatures are presumed to have acted constitutionally * * *.'" 349 F. Supp. at 1283.

Although several other claims were raised by the Plaintiffs in connection with the alleged unconstitutionality of age and residency requirements imposed on all candidates by the Texas

Election Code, these contentions were not among those set forth in the Jurisdictional Statement and are therefore not now before the Court for consideration.

SUMMARY OF THE ARGUMENT

The crux of the problem presented by this appeal is whether the totality of the restrictions imposed on minority political candidacy by the challenged provisions of the Texas Election Code constitutes an impermissibly complicated, time-consuming, expensive and invidiously discriminatory burden on such candidacy in contravention of the First and Fourteenth Amendments. Barriers to effective political participation are of obviously crucial constitutional significance, not simply because of their relevance to future organized efforts to cultivate a climate of ideological heterodoxy in a State government dominated since the days of Reconstruction by a single monolithic party, but also because they implicate the whole spectrum of basic political values traditionally recognized as essential to the proper functioning of our system of representative democracy. "Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." *Williams v. Rhodes*, 393 U.S. at 39 (concurring opinion by Mr. Justice Douglas).

In both *Williams* and *Jenness v. Fortson* the Court was confronted with State election laws under which minority party and independent candidates for public office, in order to secure a position on the ballot, were required to fulfill requirements materially different from those imposed on the candidates of established political parties. The first case involved extraordi-

narily stringent Ohio enactments that in their practical effect excluded all but the major political parties from effective electoral participation, while the second dealt with a relatively liberal Georgia statutory system under which majority and minority party candidates competed on more or less equal terms for ballot position. Thus, while in *Williams* the Court held that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights [amounting to] an invidious discrimination, in violation of the Equal Protection Clause" of the Fourteenth Amendment, 393 U.S. at 34, in *Jenness* the Court found that there had been no discrimination at all, invidious or otherwise, because the State of Georgia had merely provided "two alternative paths [to candidacy], neither of which can be assumed to be inherently more burdensome than the other." 403 U.S. at 441.

As the District Court correctly recognized, "this case presents a new combination which falls squarely in the middle" between the extremes considered in *Williams* and *Jenness*. 349 F. Supp. at 1276. However, it then went on to evaluate the claimed infirmities in the Texas system, not in terms of their total impact on minority political participation in relation to its relative ease or difficulty when compared with the nominating procedures of the established parties, but according to whether any of the *specific* requirements imposed on minority parties and candidates by the Texas Election Code, considered individually and in the abstract, were in and of themselves sufficiently onerous to justify judicial invalidation. Not surprisingly, the District Court then concluded that because each impediment to candidacy had been found to be constitutionally supportable the entirety of the Texas scheme was likewise valid.

Needless to say, this is not the analytical approach mandated by the Court's previous decisions in *Williams* and *Jenness*. In order to correctly appraise the constitutional vitality of the alternative route to candidacy which Texas has provided for minority parties, it is necessary to determine whether all of the statutory obstacles, considered together, impose a substantially greater handicap on the aspiring minority party and its candidates than the equivalent restrictions impressed on established parties and their candidates. If, as alleged, an obviously significant disparity in treatment exists — that is, if the Democratic and Republican Parties are permitted to field a slate of candidates in the general election through nominating procedures that are intrinsically less rigorous than those afforded to the Appellants — and if the State is unable to demonstrate that the totality of the discriminatory burdens imposed is *necessary* to accomplish a compelling State interest, the Texas system is constitutionally infirm and must be supplanted by alternative methods that will preserve the State's legitimate interests in limiting ballot positions to bona fide parties and candidates without simultaneously effectuating virtually absolute major party hegemony that strangles emergent political parties in the crib.

Significantly, the District Court apparently twice misperceived the appropriate constitutional standard in concluding that "the totality of the Texas Election Code *serves* a compelling State interest and does not operate to *suffocate* the election process." 349 F. Supp. at 1276 (emphasis added). First, the determination that particular statutory restrictions on political candidacy actually serve to promote a compelling State interest is only one-half the inquiry; in addition, the Court must be

satisfied that the State has also demonstrated the *necessity* for such restrictions. *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 337, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Second, none of this Court's previous decisions suggest that a State may throttle fundamental political rights in an invidiously discriminatory manner so long as it does not "suffocate" them. Phrased another way, there is no such thing as a *de minimus* constitutional violation.

In any event, the Appellants have assaulted the Texas Election Code on two major fronts. First, they assert that the totality of the general election ballot certification requirements applicable to them is both an abridgement of their right to effective political association under the First Amendment and an invidious discrimination against minority party candidacy in violation of the Fourteenth Amendment. The "totality" of the relevant restrictions includes:

(i) exceptionally burdensome and overly technical party organizational requirements which necessitate the holding of precinct, county, district and state nominating conventions on dates coinciding with the convention and primary election days of the established political parties;

(ii) the submission to the Texas Secretary of State of the signatures, addresses and voter registration certificate numbers of approximately 22,000 voters who desire that the names of minority party candidates be printed on the general election ballot;

(iii) an absolute prohibition, supplanted by criminal sanctions, against signing a nominating petition if the individual

has voted in any primary election or participated in any convention of any other political party during the same election year;

(iv) a requirement that all nominating petitions be signed under oath before a notary public;

(v) the exclusion of unregistered but otherwise qualified voters from the pool of available signatories to a nominating petition;

(vi) a flat prohibition against the circulation of all nominating petitions until *after* the date on which the major party primaries are held;

(vii) a limitation on the time period during which nominating petitions may be circulated to a period of approximately 55 days following the major party primaries and approximately four months before the general election;

(viii) a mandatory declaration of candidacy approximately three months before the primary elections and approximately nine months before the general election;

(ix) the exclusion of minority parties from access to public funds appropriated by the State for the purpose of financing the primary elections of the established political parties, and

(x) a total failure to afford the minority party any substantial equivalent to the absentee primary balloting allowed to the major parties, as a result of which they are permitted approximately three weeks to secure an irrevocable commitment from a substantial portion of the Texas electorate.

Second, apart from its role as part of the "totality" of inhibitory features of the Texas Election Code, the prohibition

against voting in a primary election and thereafter signing a nominating petition is, in and of itself, an impermissible abridgement of the rights of free expression and association guaranteed by the First and Fourteenth Amendments. Certainly the State has a legitimate interest in preserving the integrity of a political party's nominating procedures against coordinated efforts to subvert them; to this extent, restrictions against cross-over voting in primary elections and dual or multiple participation in party conventions are obviously justified as legitimate methods for counteracting "raiding" and similar practices aimed at weakening an opposition party. But the critical fact is that under the Texas system a signature on a nominating petition is in no sense equivalent to a primary "vote" for a particular candidate or slate of candidates, since the conventions rather than the signatures determine whom a minority party's nominees will be. Nominating petitions thus do no more than determine who will be on the ballot; because signing one cannot exclude an otherwise viable candidate from effective political participation, the dangers implicit in cross-over voting and "raiding" of competing party primaries are nonexistent.

Moreover, because Texas has never attempted to promote party solidarity to the extent of limiting a voter's options in the general election to those candidates nominated by the political party in whose primary he voted, there is no conceivable justification in requiring a registered Democrat or Republican to participate in nominating only his party's candidates and no one else. By demanding that the members of an established party confine themselves to the nomination of party candidates, the State has clearly limited the individual's freedom of choice to one conglomerate of nominees, a course of action manifestly

antithetical to the ideological diversity encouraged and protected by the First Amendment.

In each of the foregoing respects the Texas Election Code is constitutionally infirm. The holdings of the District Court to the contrary should be reversed.

ARGUMENT

1. The totality of the general election ballot certification requirements imposed on minority political parties by the Texas Election Code abridges the rights of free association, liberty, due process and equal protection guaranteed by the First and Fourteenth Amendments.

An assessment of the validity of Texas' restrictions on minority party candidacy within the context of the First and Fourteenth Amendments necessarily entails accommodation of the competing individual and governmental interests implicated by the State's electoral processes. On the one hand, there is "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. at 30. On the other hand, "preservation of the integrity of the electoral process is [also] a legitimate and valid state goal," *Rosario v. Rockefeller*, 41 U.S.L.W. 4401, 4404, March 20, 1973, as is the "legitimate interest in regulating the number of candidates on the ballot." *Bullock v. Carter*, 405 U.S. 134, 145, 92 S. Ct. 849, 31 L. Ed. 2d (1972). Plainly the problem is to balance these frequently conflicting political values in a manner that will, insofar as possible, maintain each of them intact.

Even so, as the District Court correctly held, it is quite apparent at this stage in the evolutionary development of our constitutional history that the balance must be weighted heavily in favor of individual freedom of choice. Since "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. at 336, State laws that taken as a whole impose substantially greater handicaps on certain classes of political candidates almost invariably intrude upon fundamental rights because such disparity in treatment has "a real and appreciable impact on the exercise of the franchise" as the direct consequence of its "patently exclusionary character." *Bullock v. Carter*, 405 U.S. at 143-44. Consequently, the totality of such restrictive laws must be viewed in terms of the familiar principle that an "exacting standard of precision [is required] of statutes affecting constitutional rights." *Dunn v. Blumstein*, 405 U.S. at 360; *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). Even though such statutes are reasonably related to the accomplishment of some legitimate State interest, they will nevertheless fail to pass constitutional muster unless they are also "necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. at 634 (emphasis added); *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

Obviously the Appellants here do not contend that the

objectives ostensibly sought to be achieved by the challenged provisions of the Texas Election Code do not constitute compelling State interests. Rather, their position is that "there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity" and that the State of Texas therefore "may not choose the way of greater interference" in light of these available alternatives. *Dunn v. Blumstein*, 405 U.S. at 343.

Williams v. Rhodes is itself a classic illustration of the precept that State regulatory effort, impinging upon basic individual rights can be justified only upon a showing by the State that its restrictions are necessary to accomplish a compelling State interest:

"No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a *decided advantage* over any new parties struggling for existence and thus place *substantially unequal burdens* on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote can be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place *such unequal burdens* on minority groups when rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' (citation omitted)." 395 U.S. at 31 (emphasis added).

The preceding quotation suggests two considerations of de-

cisive importance to the disposition of these cases. First, the primary emphasis in *Williams* was not upon the burdensome or restrictive character of the Ohio election laws in any abstract sense but rather upon the *comparative* inequality between majority and minority political parties that resulted from them. Second, while the Court in *Williams* did point out that the practical effect of the Ohio enactments was to exclude all minority candidates from a place on the general election ballot, there was not the slightest suggestion that all discriminatory restrictions on candidacy may be automatically justified simply because some candidates or parties might somehow manage to comply with them.

The significance of a *comparative* analysis of the relative burdens imposed by State election laws on different classes of candidates was underscored by the Court's subsequent decision in *Jenness v. Fortson*. After examining the alternative routes to candidacy provided by Georgia law, the Court concluded that not only was minority candidacy encouraged by a number of procedures that had been absent in *Williams* (thereby precluding the assertion that the totality of the restrictions constituted an undue burden on the exercise of First Amendment rights) but also that the relative burdens of candidacy were more or less evenly distributed, although in a manner taking into account "obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." 403 U.S. at 1976. Thus, in a very real sense, *Jenness* posed no equal protection problem of the traditional variety at all, simply because the differences in treat-

ment accorded to different classes of individuals did not impose substantially greater hardships upon any particular class.⁸ In the absence of any showing that some definable category of citizens suffers significantly more adverse consequences as the direct result of a particular legislative classification, there has been no "discrimination" of constitutional proportions despite superficial distinctions among individuals,⁹ and thus the question of whether such "discrimination" is supportable by an appeal to any State interest is more or less academic.

Equally relevant in this regard are the Court's references in *Jenness v. Fortson* to the fact that the Georgia nominating procedures "do not operate to freeze the status quo." 403 U.S. at 438. Because both *La Raza Unida* and the *Texas Socialist*

⁸ "The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment * * * is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. This is a premise that cannot be uncritically accepted. * * * We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." *Jenness v. Fortson*, 403 U.S. at 440-41 (footnote omitted; emphasis added).

⁹ The Court's previous decisions have clearly recognized the critical distinction between cases posing a traditional equal protection problem, in which State legislative classifications adversely affect the interests of discrete groups of individuals with identifiable common interests and characteristics, and those in which the law either does not effectuate a discernible classification, e.g., *Gordon v. Lance*, 403 U.S. 1, 5, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971); *James v. Valtierra*, 402 U.S. 137, 142, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 153, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Palmer v. Thompson*, 403 U.S. 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971); cf. *San Antonio Independent School District v. Rodriguez*, 41 U.S. L.W. 4407, 4414, March 21, 1973, or imposes substantially equivalent benefits and burdens upon all classes, e.g., *Jenness v. Fortson*, *supra*; *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-08, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969); cf. *Britt v. North Carolina*, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Workers Party had successfully complied with the qualifications for ballot position imposed by the Texas Election Code, the District Court implied that the restrictions did not manifest such a "freezing" effect and were therefore constitutional. 349 F. Supp. at 1281. However, metaphors and catchphrases plainly provide no satisfactory foundation for constitutional adjudication, particularly when they suggest that the totality of a State's discriminatory candidacy laws satisfies constitutional standards so long as at least one minority party or candidate is able to successfully comply with them. Nothing said or suggested in either *Williams* or *Jenness* supports an inference that only wholesale exclusion of such candidates from the ballot raises First or Fourteenth Amendment problems.

This is particularly obvious in light of the Court's characteristic description of statutes which on their face are so vague or overbroad that their language encompasses not merely conduct subject to legitimate proscription but also modes of expression and association protected by the First Amendment. The metaphor is similar; such statutes are said to generate a "chilling effect" on the exercise of constitutional rights. *Domkowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965); *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). Clearly such facially unconstitutional statutes do not necessarily impose an *absolute* prohibition on protected activities, despite the deterrent effect resulting from their very existence, yet it is precisely the fact of an unnecessary burden upon both unprotected conduct and rights of free expression and association that renders the legislation invalid, not its efficacy in effectuating total rather than

partial suppression of individual rights. Individuals challenging the facial constitutionality of State laws on First Amendment grounds thus need not first establish that as the result of such laws the exercise of their rights has been totally proscribed. It is enough to show that the impediments imposed by the State are greater than those essential to preserve its legitimate regulatory interests. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

Likewise, within the context of the equal protection clause, the totality of a State's ballot certification requirements may abridge Fourteenth Amendment rights even though some minority parties or candidates have successfully overcome manifestly discriminatory burdens that have been placed upon them. The time, organizational effort and financial resources devoted by such parties or candidates to overcoming the established parties' initial advantage resulting from the comparative ease with which they attain ballot position have necessarily been lost when the time for serious campaigning arrives, leaving the minority candidate exhausted before the real race has even begun. Moreover, the fact that one party or candidate has been able to satisfy discriminatory nominating requirements bears no relation whatever to the ability of others in similar circumstances to comply, even though their claim to the status of bona fide contenders may be even more indisputable. While the

ability of some individuals or groups to satisfy allegedly unconstitutional restrictions on ballot position is perhaps one factor to be considered in assessing the "totality" of their impact, success in isolated instances or in one election year is obviously not determinative in and of itself.

The Court's recent decision in *Rosario v. Rockefeller*, 41 U.S.L.W. 4401, March 21, 1973, does not modify the established precept that a Plaintiff whose claims rest in part upon asserted equal protection grounds need not be subjected to "a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred." 41 U.S.L.W. at 4406 (dissenting opinion by Mr. Justice Powell). In upholding New York's requirement that a voter enroll in his chosen political party at least 30 days before the general election preceding the primary in which he wishes to vote, the Court simply recognized that the practical effect of such a time deadline was not to disenfranchise any voter; instead, it merely imposed upon all voters the identical, nondiscriminatory requirement of designating a party preference and permitted all voters to comply or not to comply as they so chose. Since nothing in the record suggested that inability rather than unwillingness to comply with State law was responsible for the Plaintiff's disenfranchisement, the Court concluded that the validity of the resultant classification of eligible and ineligible primary electors was to be determined according to traditional standards of "reasonableness" under the Fourteenth Amendment.

The situation is quite different, however, when the impact of particular ballot certification procedures falls with a dispropor-

tionately heavy hand upon minority political parties and their supporters. In these circumstances the State laws on their face treat different groups of people in singularly disparate ways. Whether the names of minority candidates appear on the general election ballot depends not upon a simple decision to register as a candidate but upon the party's ability to comply with procedures from which the candidates of established parties are exempted. Any minority party failing to comply with these procedures is absolutely excluded from a place on the ballot, regardless of what success others subjected to the same restrictions may enjoy. Thus, even assuming that the Texas Election Code may never exclude all minority candidates from the ballot in any given election year, its "patently exclusionary character," *Bullock v. Carter*, 405 U.S. at 144, is sufficient to require that the totality of its restrictions be tested according to the more rigorous equal protection standard, irrespective of whether they can be said to "freeze the status quo."

With respect to the claimed violation of First Amendment rights, the Texas system is concededly less stringent than that invalidated in *Williams v. Rhodes* insofar as the potential for effective political participation is greater. Likewise, there is little doubt that the totality of ballot restrictions imposed by Texas on minority candidacy is not quite so "invidiously discriminatory" as that disapproved in *Williams*, since some minority Texas parties have in fact surmounted the obstacles imposed. But there is little relevance in the supposition that Texas' scheme may be less unconstitutional than Ohio's was found to be. Rather, the important questions are (i) whether the barriers to minority political candidacy under Texas law are "inherently

more burdensome" than those governing established parties, and, if so, (ii) whether the obstacles are justified by the stringent test of necessity.

A side-by-side comparison of the Georgia procedures upheld in *Jenness* with the requirements set forth in the Texas Election Code is enough to establish their patent dissimilarity. Unlike Georgia, Texas imposes on minority parties the "Procrustean requirement" of establishing elaborate statewide party organizational machinery, entailing compliance with a multitude of administrative details commencing more than fourteen months before the general election. Precinct, county, district and State conventions must be held, even though the party's appeal "may be essentially to urban voters or to rural voters, as the case may be." *American Party of Texas v. Bullock*, *supra*, note 7 (dissenting opinion by Mr. Justice Douglas). Unlike Georgia, Texas limits the available pool of signatures for nominating petitions to those individuals who have not previously participated in another party's primary election or nominating convention. Unlike Georgia, which allowed approximately six months for securing signatures on nominating petitions, Texas limits the time in which such signatures must be collected to a period of roughly 55 days. Unlike Georgia, Texas requires that signatures on nominating petitions be obtained *after* the major party primary elections, at a time when the political interest of the general population is likely to be at a relatively low level. Unlike Georgia, Texas requires that all signatures on nominating petitions be notarized.

In short, there is simply no plausible foundation for any contention that Texas "imposes no suffocating restrictions what-

ever upon the free circulation of nominating petitions." *Jenness v. Fortson*, 403 U.S. at 438. On the contrary, it has obviously impressed a myriad of restrictions and conditions upon such petitions which, in their total impact on minority parties and their candidates, significantly impair the ability to organize an effective political campaign because of the very real contingency that the requirements cannot be met. Insofar as a minority party must continually anticipate the possibility that all of its good-faith efforts to place a slate of candidates on the general election ballot may ultimately be wasted, the very existence of this plethora of impediments discourages new party organizational efforts and thereby limits the available channels for effective political participation. Absent some compelling justification for the totality of these requirements, they must fall under the First Amendment.

Moreover, although it is extraordinarily difficult to compare the relative burdens imposed on established and minority parties under Texas law, it is nevertheless clear that for all practical purposes both major parties will invariably be entitled to place the names of their candidates for office on the general election ballot, and that such candidates need only file for office and win a majority of the votes cast in the primary elections. On the other hand, minority parties and their candidates must meet, in addition to all of the conditions previously discussed, *identical* deadlines for declarations of candidacy,¹⁰ and such candidates must likewise overcome the equivalent obstacle of gaining a majority of their party's votes at the nominating conventions. Given the realities of the situation, and the intuitive premise

¹⁰ Compare Art. 13.12 with Art. 13.47a.

that the relative difficulty of obtaining party support as a prospective nominee does not depend upon whether that support must be obtained through a primary election or by means of a nominating convention, it is clear that the impediments to minority party candidacy imposed by the Texas Election Code are "inherently *more* burdensome" in the sense demanded by *Jenness v. Fortson*. To the extent that the totality of these requirements is not necessary to support a compelling State interest, the scheme plainly effectuates an impermissible invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

The District Court's failure to grasp the magnitude of the vice infecting the Texas system is perhaps more attributable to its piecemeal approach to the problem, coupled with a virtually myopic concentration on the percentage requirement for signatures on nominating petitions. Rather than recognizing the inescapable fact that minority party candidates and constituencies are subjected to substantially disproportionate burdens in their efforts to win a place on the general election ballot, the District Court instead viewed the problem in terms of whether the 1% requirement was, in some abstract sense, "constitutionally permissible." Finding that it was, after "balancing Texas' burdensome organization requirements against its lenient 1% petition requirement," 349 F. Supp. at 1279, the Court then went on to consider each of the additional restrictions imposed by Art. 13.45(2) and to hold each of them constitutional *in and of themselves*. No effort whatever was made to assess the impact of all restrictions in their "totality," nor was there any explanation offered to justify the implicit assumption that these additional restrictions were irrelevant to the ability to satisfy the percentage of signatures requirement.

Obviously the percentages involved are of little if any relevance when considered apart from the other factors which encourage or discourage the signing of nominating petitions. This critical fact has been consistently overlooked by the lower Federal courts in their efforts to appraise the "totality" of State-imposed restrictions on minority candidacy. Thus, virtually all opinions in the area focus an altogether disproportionate amount of attention on percentages, as if some more or less arbitrary fraction of votes in a preceding election (e.g., the 5% requirement upheld in *Jenness v. Fortson*) could somehow be set as a constitutional maximum. See, e.g., *People's Party v. Tucker*, 347 F. Supp. 1 (M.D.Pa., 1972) (upholding 2% of the largest vote cast for any candidate in the State as "reasonable" but invalidating requirement that signatures be collected during three-week period almost nine months before election); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S. D. Ohio, E. D., 1970), *appeal dismissed sub nom. Gilligan v. Sweetenham*, 405 U.S. 949, 92 S. Ct. 1161, 31 L. Ed. 2d 227 (1972) and *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972) (invalidating 7% of vote cast for governor or presidential elector); *Baird v. Davoren*, 346 F. Supp. 515 (D. Mass., 1972) (upholding 3% of votes cast for governor); *Jones v. Hare*, 440 F. 2d 685 (6 Cir., 1971), *cert. denied sub. nom. Jones v. Austin*, 404 U.S. 911, 92 S. Ct. 237, 30 L. Ed. 2d 184 (1971) (upholding 1% of votes cast for successful candidate for Secretary of State); *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D.Ill., 1971), *affirmed*, 403 U.S. 925, 91 S. Ct. 2247, 29 L. Ed. 2d 705 (1971) (upholding 5% of votes cast for office sought); *Moore v. Board of Elections*, 319 F. Supp. 437 (D.C.D.C., 1970) (upholding 2% of all

registered voters or 5,000 signatures, whichever less); *Beller v. Kirk*, 328 F. Supp. 485 (S.D.Fla., 1970), *affirmed sub nom. Beller v. Askew*, 403 U.S. 925, 91 S. Ct. 2248, 29 L. Ed. 2d 705 (1971) (upholding 3% of total votes cast).

Plainly the arbitrary determination that some percentage requirements are inherently "reasonable" and others inherently "unreasonable" does not provide a suitable foundation for principled constitutional adjudication. Depending upon the other circumstances involved in any particular case, *any* percentage may be impermissible. For example, if a minority party could secure ballot certification only by collecting signatures on a nominating petition amounting to .00001% of the total votes cast for the office of governor in the last preceding general election, the deceptively low percentage requirement would be of little comfort if concomitant restrictions limited the time for collecting such signatures to the hours between 2 and 5 o'clock on the morning of April 1 and restricted the source of available signatories to those voters less than four feet tall. Percentages are significant *only* when they are considered in connection with the entirety of the other restrictions imposed on minority candidacy, and the entirety of such restrictions is in itself relevant *only* when viewed in terms of its comparative impact on the ability of minority parties and their adherents to organize successfully and to compete effectively with their established counterparts.

The conceptual sterility of any approach concentrating on percentages of signatures required for minority candidate nominating petitions, to the exclusion of the myriad of other factors affecting the probability that the percentage requirement can

actually be met, is demonstrated by the District Court's bald conclusion that, "although any percentage requirement is necessarily going to be arbitrary, 1% is a fair minimum to serve the state's compelling interest * * *." 349 F. Supp. at 1279. The question then becomes why 1% is necessarily "fair" and, more significantly, why any other percentage would not also be "fair" to promote the concededly compelling State interest of insuring that only bona fide candidates having some minimal degree of potential electoral support are ultimately given a place on the general election ballot. *Williams v. Rhodes*, 393 U.S. at 32; *Jenness v. Fortson*, 403 U.S. at 442. So long as the inquiry is directed only toward individual aspects of a State's nominating procedures, rather than toward the system taken as a whole, the question can never be satisfactorily answered. Indeed, appearing to recognize that each of the individual restrictions imposed on minority candidacy by the Texas Election Code is in no sense *essential* to the achievement of any legitimate governmental objective,¹¹ the District Court's opinion does not once evaluate any single restriction in terms of the test of *necessity* prescribed by *Williams v. Rhodes*.

The proper application of the analytical method dictated by *Williams* avoids these difficulties by considering the "totality" of the restrictions and their comparative impact on minority party

¹¹ "[T]he only legitimate interest the State may invoke in defense of [a] barrier to third-party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion." *Williams v. Rhodes*, 393 U.S. at 46 (concurring opinion by Mr. Justice Harlan). Preserving this interest plainly does not require elaborate party organizational requirements, notarized signatures on nominating petitions, or fixed percentages of signatures. Consequently, the District Court's technique has the anomalous effect of rendering any defense of State candidacy restrictions well-nigh impossible.

political participation. If the alternative routes to a place on the general election ballot entail substantially equivalent burdens for both minority party and established party candidates, the system as a whole will be upheld, even though the State might be unable to demonstrate that particular conditions for candidacy are necessary to promote a compelling State interest.¹² *Jenness v. Fortson, supra*. On the other hand, if the system as a whole imposes comparatively more onerous obstacles to minority candidacy, and if the totality of these restrictions creates manifestly serious barriers to effective exercise of associational rights protected by the First Amendment, the procedures adopted by the State can be sustained against constitutional assault only if they are demonstrably necessary to avoid the risk of a proliferation of candidates and the resultant danger of voter confusion. Clearly the "entangling web" of candidacy restrictions here is the spiritual kin of the scheme disapproved in *Williams v. Rhodes* and is easily distinguishable from the more or less neutral classification considered in *Jenness*. Given its essentially malignant character with respect to minority organizational efforts, the totality of the restrictions imposed by Art. 13.45(2) cannot be sustained in light of the available, less restrictive alternatives.

From the proper perspective it is plain that the Court need not determine whether all of the *individual* requirements for

¹² Of course, specific statutory impediments to effective minority candidacy may by themselves effectuate such an obviously "real and appreciable impact on the exercise of the franchise," *Bullock v. Carter*, 405 U.S. at 144, that they must be closely scrutinized under the more stringent constitutional standard. Filing fees of the sort invalidated in *Bullock* are one example; prohibitions against signing a nominating petition after voting in a major party primary, discussed *infra*, are another.

ballot certification imposed on minority political parties by the Texas Election Code are all *individually* "necessary." Plainly none of them are, and the State need not affirmatively attempt the impossible task of demonstrating that every restriction is indispensable. But "[i]f, when the state's election laws are viewed *in their totality*, they restrict the rights of some groups to gain access to the ballot * * * some other nondiscriminatory 'compelling state interest' must be shown to justify such restraints." *Baird v. Davoren*, *supra*, 346 F. Supp. at 519 (emphasis added); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 989 (S.D.N.Y., 1970), *affirmed*, 400 U.S. 806, 91 S. Ct. 65, 27 L. Ed. 2d 38 (1970), "*Williams* teaches that a third party must have a *reasonable* opportunity to place its candidates on the ballot in a general election," *Barnhart v. Mandel*, 311 F. Supp. 814, 825 (D. Md., 1970) (emphasis added), and in the present context "reasonableness" can only be gauged in terms of a comparative analysis. Since in Texas the minority party and its candidates are subject to manifestly more stringent restriction on the whole than are the majority parties and their nominees for office, and since the alternative Texas routes to a position on the general election ballot thus place third-party candidates in an inherently less advantageous position, the entire system must necessarily fall because the legitimate State objectives which it seeks to accomplish could obviously be attained without the imposition of such relatively unequal burdens upon one discrete class of participants in the political process.

In short, although *Jenness v. Fortson* demands little more than comparatively equal opportunities for ballot position among all prospective candidates, the Texas Election Code has simply

failed to provide them. The totality of its discriminatory restrictions on minority party candidacy are accordingly unconstitutional under the First and Fourteenth Amendments.

2. The provisions of the Texas Election Code which prohibit minority political parties from circulating nominating petitions for the general election until after the major party primary elections, and which further prohibit a voter who has previously participated in a major party's primary election or nominating convention from thereafter signing a minority party's nominating petition during the same election year, abridge the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

Unlike the Georgia nominating procedures upheld in *Jenness v. Fortson*, the Texas system incorporates a flat prohibition against voting in a major party primary election and thereafter signing a nominating petition for the purpose of placing the names of minority party candidates on the general election ballot. Apart from its role as one of the factors contributing to the invalidity of the totality of the Texas scheme, this restriction is, by itself, clearly violative of fundamental First Amendment freedoms.

It is axiomatic, of course, that "political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership." *Rosario v. Rockefeller*, 41 U.S.L.W. at 4406-07 (dissenting opinion by Mr. Justice Powell). Whatever the supposed long-term benefits thought to be gained by absolute party solidarity and unswerving across-the-board loyalty to the slate of candidates that ultimately emerges from the nominating process, the bulk of our citizenry has consistently declined to limit its allegiances, political participation and organizational efforts to so narrow an ambit. Ballots

are cast for individual candidates, not parties, and it is commonplace for a single voter's electoral preferences to be representative of a variety of parties and doctrines spanning the political spectrum from one extreme to the other. A refusal to confine the exercise of constitutional rights to the perimeters enclosed by a party platform is in no sense alien to our traditions; indeed, the Constitution encourages such ideological diversity, and it is far too late for the argument that the "liberty" of political association protected by the First and Fourteenth Amendments, *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), encompasses no more than the right to promote a single party's candidates. Absent some overriding State interest, any restriction of the individual's option to extend his support to a multiplicity of candidates and causes infringes upon his constitutionally protected rights.

Clearly the State has a profoundly important obligation to insure insofar as possible that a majority of bona fide party members is able to nominate the candidates it wishes without interference resulting from organized efforts to subvert the party's nominating procedures. Consequently, the District Court analyzed the Texas Election Code's restrictions on the signing of minority party nominating petitions almost entirely in terms of the State's legitimate interest in preserving the integrity of the primary election process against vote fraud:

"The Courts recognize a state's compelling interest to preserve the integrity of its election process. Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*,

[369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)].' Several Courts have found that a state has an interest in preventing 'raiding,' whereby members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. So long as these 'anti-raiding' provisions are narrowly drawn, as in the challenged Texas provision, the right of disaffected voters to associate in a new political party is not unduly burdened." 349 F. Supp. at 1280 (footnotes omitted).

The fundamental defect implicit in this analysis is open and obvious: under the Texas system, an individual who signs a minority party nominating petition is not *voting* for a candidate. Not only is one who signs a nominating petition completely free to vote for any opposing candidate or slate of candidates in the succeeding general election; more importantly, he is not engaged in the process of *excluding* competitors for the same office as he would be if he were participating in a party primary election or nominating convention. Of course, there is no question that Texas may legitimately seek to insure that only bona fide party members are permitted to select a slate of candidates by choosing among those who have filed for particular offices,¹³ and it has done so by providing that a voter who helps to select one party's candidates may not thereafter influence the course of any other party's nominating processes by participating in its primary election or nominating convention. But the *additional* prohibition against signing a nominating petition plainly does not further the same goal. Rather than determining who the minority party's candidates will be, voters who sign such pe-

¹³ *Rosario v. Rockefeller*, 41 U.S. L.W. 4401, March 21, 1973; *Lippitt v. Cipollone*, 404 U.S. 1032, 92 S. Ct. 729, 30 L. Ed. 2d 725 (1972), *affirming* 337 F. Supp. 1405 (N.D. Ohio, 1971).

titions have done nothing more than indicate their desire that the names of such candidates as are ultimately selected by the party will appear on the general election ballot. Since the purposes served by signatures on nominating petitions are entirely distinct from those served by participation in the procedures by which party nominees or policies are ultimately determined, the analogy between this prohibition and those truly designed to prevent "raiding" and similar concerted efforts to undermine an opposition party is a false one, simply because the petition — unlike the primary election or the party convention — is not in any sense a part of the candidate selection process.

Obviously, if enough minority party members voluntarily decided to relinquish their opportunity to participate meaningfully in party affairs, they might conceivably forego the party conventions and cast a spurious block vote in a major party primary for the purpose of nominating the weaker candidates. However, even apart from the fiction implicit in any assumption that bona fide minority party members will renounce all participation in an organizational structure needing every available participant in order to survive as a viable entity, the obvious answer to this objection is that *precisely* this alternative has traditionally been available to the members of the "minority" Republican Party in Texas, who by voting in the Democratic primary are nevertheless perfectly free to switch their allegiance to the Republican nominees in the general election. The point is that the restrictions on the circulation of minority party nominating petitions imposed by the Texas Election Code effectuate no *further* protection for the integrity of the primary electoral process beyond that accomplished by the general pro-

scription against participation in the primaries or conventions of more than one party. Rather than discouraging cross-over voting, "raiding" and similar practices, such restrictions do nothing more than impose an irrational limitation upon the number of available signatures, none of which can be secured until after most of the electorate has already committed itself to an irrevocable, all-or-nothing choice.

And this is plainly the essence of the constitutional vice that infects the Texas system: a member of an established political party must support all of the party's prospective nominees, to the exclusion of all others, or he may support none of them. If one minority candidate appeals to him (or, perhaps as important, if one of his own party's nominees does *not* appeal to him), he can do nothing to help promote the individuals of his choice in the most effective way possible — that is, by joining together with others who would likewise desire to see the names of alternative candidates on the general election ballot in order to accomplish that result. By thus conditioning access to ballot position upon party rather than individual loyalties, the State has in effect imposed an arbitrary barrier to effective political association in violation of the First Amendment and a party member's right to dissent from the choice of a nominee of which he disapproves. Since "all political ideas cannot and should not be channeled into the programs of our two major parties," *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957), meaningful political action is necessarily contingent upon a fair opportunity to lend simultaneous support and allegiance to candidacies cutting across formal party lines. The Texas Election Code stifles that diversity for no apparent reason whatever.

Of course, if signing a minority party nominating petition were in any sense equivalent to voting in a party primary election or participating in a party convention — that is, if signing could be equated with the processes by which prospective nominees are accepted or rejected, party policy formulated, and the future course of party affairs determined — the District Court's reasoning would have persuasive force, particularly in light of *Rosario v. Rockefeller, supra*. The State may legitimately stop a voter from helping to determine the nominees of two different parties or from participating in the internal affairs of more than one party, but only because such dual participation engenders fraud and endangers the integrity of the entire nominating process. Such considerations are absent when the question is merely whether or not the names of minority party candidates will appear on the general election ballot. In these circumstances an arbitrary prohibition against manifesting support for the candidates of more than one political party accomplishes nothing more than suppression of constitutional rights under a superficially deceptive claim that legitimate State interests are being promoted. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960).

CONCLUSION

For the foregoing reasons, the Appellants respectfully urge that the judgment of the District Court should be reversed insofar as it upholds the constitutionality of the totality of the restrictions imposed on minority party candidacy by the Texas

Election Code, including those which limit signatures on minority party nominating petitions, and that the District Court should be directed to enter an order enjoining the enforcement and application of these provisions against the Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Anthony Maness, a member of the Bar of the Supreme Court of the United States and counsel of record for the Appellants Texas New Party and Texas Socialist Workers Party, hereby certify that on the 5th day of May, 1973, I have caused to be mailed three copies of the foregoing brief to other counsel of record at the following addresses: Mr. Sam L. Jones, Jr., Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711; Mrs. Gloria T. Svanas, Attorney at Law, 418 West Fourth Street, Odessa, Texas 79761; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76700; and Mr. Robert W. Hainsworth, Attorney at Law, 3710 Holman Avenue, Houston, Texas 77004. I further certify that all parties required to be served have been served.

MICHAEL ANTHONY MANESS

APPENDIX

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS ACT OF 1871

42 § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Art. 13.02 Nominated at primary

On primary election day in 1952 and every two (2) years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates

for Congress and all district offices to be chosen by the vote of any district comprising more than one (1) county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more for governor at the last general election, shall, together with all candidates for offices to be filed by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 180.

Art. 13.03 Date of primary

The first Saturday in May of 1960, and every two (2) years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for an office unless he has complied with every requirement of all laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any office under this Article, a second primary election shall be held by such political party on the first Saturday in June succeeding such general primary election, and only the name of the two (2) candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary, except as herein stated, provided that in case no one received a majority in the first primary and if the second and third highest candidates in that race shall be tied these two (2) shall cast lots under the direction of the county chairman or state chairman as the case may be to see which of the two (2) shall have his name printed on the second primary ballots. The second primary election shall be conducted according to the law prescribed for

conducting the general primary election and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations, except where provided for by law. All precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than thirty (30) days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. Acts 1951, 52nd Leg., p. 1097, ch. 462, art. 181; Acts 1959, 56th Leg., p. 335, ch. 165, § 1.

Art. 13.12 Application for place on ballot

The application to have the name of any person affiliating with any party placed on the official ballot for a general primary as a candidate for the nomination of such party for any office for which a nomination may be made at such primary shall be governed by the following:

1. Such application shall be in writing, indicating the office for which nomination is sought and whether for a full term or for an unexpired term, signed and duly acknowledged by the person desiring such nomination, or by twenty-five qualified voters. It shall state the occupation, county of residence, and post-office address of such person, and if made by him shall also state his age. If the application is made by qualified voters, there shall be endorsed on the application or filed in a separate instrument, before the deadline for filing applications, a state-

ment signed by the candidate showing his consent to such candidacy.

2. The application shall be filed with the state chairman in the case of statewide offices, with the county chairman of each county which is included wholly or partially within the district in the case of district offices, and with the county chairman of the particular county in the case of county and precinct offices; provided, however, that applications of candidates for justice of the court of civil appeals shall be filed with the state chairman. Except as provided in Paragraph 2a of this section, the application shall be filed not later than 6 p.m. on the first Monday in February preceding such primary.

Subsec. 2 amended by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967; Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

Art. 13.45 Nominations by parties under two hundred thousand votes

Subdivision 1. Parties receiving more than two percent of vote for governor. Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in Sections 224 and 225 of this code.¹

Subdivision 2. Parties receiving less than two percent of vote for governor. Any political party whose nominee for governor received less than two percent of the total votes cast for governor

¹ Articles 13.47 and 13.48.

in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in Sections 224 and 225,¹ but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with Sections 222a and 224 of this code,² signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election. The address and registration certificate number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: "I know the contents of the foregoing petition, requesting that the names of the nominees of the Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during

² Articles 13.45a and 13.47.

the current voting year I have not voted in any primary election or participated in any convention held by any other political party." The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by Section 181 of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$500.

The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

At the time the secretary of state makes his certifications to the county clerks as provided in Section 3 of this code,³ he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements."

Amended by Acts 1967, 60th Leg. p. 1921, ch. 723, § 59, eff. Aug. 28, 1967. Subd. 2 amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 35, eff. Sept. 1, 1969.

Art. 13.47 Conventions of parties not required to hold primary

Political parties which are not required by law to make nominations by primary election may make nominations by conventions as provided herein.

³ Article 1.03.

Nominations for statewide offices shall be made at a state convention, which shall be held on the second Saturday in June of the election year, and which shall be composed of delegates selected in the various counties at county conventions held on the second Saturday in May. The county conventions shall be composed of delegates from the general election precincts of such counties elected therein at precinct conventions held in such precincts on the first Saturday in May.

Nominations for district offices of districts composed of more than one county or part thereof shall be made at district conventions held on the third Saturday in May of the election year, composed of delegates elected thereto from the counties having territory within the district, at the county conventions held on the second Saturday in May.

Nominations for county and precinct offices and for district offices of districts composed of only one county or part of one county shall be made at the county conventions held on the second Saturday in May.

The state executive committee of each party shall determine the formula by which the number of delegates to the county, district, and state conventions of that party shall be governed, and shall also formulate such rules as it deems desirable with respect to participation of delegates at a county convention in the nomination of candidates for precinct offices and for district offices of districts composed of only a part of the county, and in the election of delegates to a district convention where only a part of the county is included in the district.

Amended by Acts 1967, 60th Leg., p. 1923, ch. 723, § 61, eff. Aug. 28, 1967.

Art. 13.47a Application for nomination; affidavit of intent to run; filing

Sec. 1. No person shall be nominated by any state, district,

or county convention held pursuant to Articles 222, 223 and 224¹ of this Code unless he has filed with the chairman of the appropriate executive committee an application requesting that his name be placed before the convention as a candidate for nomination. The application shall conform to the requirements of Article 190 of this Code (Article 13.12, Election Code, Vernon's Texas Civil Statutes), and shall be filed in the same manner and within the time prescribed by that Article, except that it shall request that the candidate's name be placed before the convention instead of requesting that his name be placed on the general primary ballot.

Sec. 2. A person who has been nominated by a convention may decline the nomination, but he shall not be eligible for nomination by that party to any other office to be voted on at the same election except as a candidate for an unexpired term where the vacancy in office occurred subsequent to the date of the convention at which he was originally nominated.

Sec. 3. As a condition precedent to having a candidate's name printed on the official ballot under Article 227 or Article 230² of this Code, there must, in addition to the requirements of those two (2) Articles, be filed, with the person with whom the written application must, thereunder, be filed, an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot stating his occupation, county of residence, post office address, age, and the office for which he intends to run. The affidavit must be filed at the same time requests under Article 190 of this Code must be filed.

Sec. 4. The requirements of Sections 1 and 3 shall not apply to candidates for unexpired terms where the vacancy in office occurs subsequent to the tenth day preceding the regular deadline for filing applications for a place on a primary election ballot as prescribed in Paragraph 2 of Section 190 of this

code.⁴ The requirements of Section 3 shall not apply to independent candidates for any office for which the filing deadline in a primary election is extended under the provisions of Paragraph 2a of Section 190 of this code.

Sec. 4 amended by Acts 1967, 60th Leg., p. 1924, ch. 723, § 61a, eff. Aug. 28, 1967.

⁴ Article 13.12.

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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR.

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL.,
Appellants

v.

BOB BULLOCK,
Appellee

NO. 72-942

ROBERT HAINSWORTH,
Appellant

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

JOHN L. HILL
Attorney General of Texas

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL.,
Appellants

v.

BOB BULLOCK,
Appellee

NO. 72-942

ROBERT HAINSWORTH,
Appellant

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

BRIEF FOR APPELLEE

**TO THE HONORABLE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:**

NOW COMES Appellee, The Secretary of State of Texas, Mark White, Jr., who succeeded Bob Bullock, former Secretary of State of Texas, and files Brief for Appellee in response to Appellants Briefs filed by Appellants

- a. The American Party of Texas,
- b. The Texas New Party and the Texas Socialist Workers Party, and
- c. Laurel N. Dunn, et al. in Cause No. 72-887 in the Supreme Court of the United States, October Term, 1972, and
- d. Robert W. Hainsworth in Cause No. 72-942, in the Supreme Court of the United States, October Term, 1972,

and would show this Honorable Court as follows:

PRELIMINARY STATEMENT

The above Appellants are minor political parties and individuals desiring to run for public office as independent candidates. They seek to have this Court declare that certain provisions of the Texas Election Code which are statewide in application are unconstitutional as violating the First and Fourteenth Amendments to the United States Constitution by infringing on the right of association, free speech, equal protection and due process.

The cases were consolidated for hearings and trial by an Order issued by the Chief Judge of the United States Court of Appeals for the 5th Circuit on July 28, 1972, which consolidated *Raza Unida Party, et al. v. Bob Bullock*, SA-72-CA-158; *American Party of Texas, et al. v. Bob Bullock*, No. 72-CA-50; *Texas New Party, et al. v. Preston Smith, Governor and Bob Bullock*, CA-72-H-990, in the United States District Court for the Western District of Texas, San Antonio Division, and ordered the empaneling of a Three-Judge District Court. The consolidated cases were set for trial on the merits for September 7, 1972, in United States District Court for the Western District of Texas in San Antonio. The stipulations of fact were agreed upon and filed in the above respective consolidated cases on August 31, 1972.

Robert Hainsworth v. Bob Bullock, Civil Action No. A 72-CA-111 was filed in the United States District Court for the Western District of Texas at Austin and ordered by Chief Judge Brown to be consolidated for trial on September 7, 1972, with the above like cases but Defendant Bob Bullock was not served soon enough to answer same, but Robert Hainsworth appeared and his case was heard along with the other consolidated cases and additional pleadings and briefs were allowed to be filed in the Hainsworth case.

OPINIONS BELOW

A Three-Judge Federal District Court was convened for trial of all of the consolidated cases in United States District Court in San Antonio on September 7, 1972, and on September 15, 1972, a memorandum opinion and order was entered by the Court dismissing each of the four cases first consolidated (not the Hainsworth case) and denying

all relief requested in the Complaints. All Temporary Restraining Orders which had been previously granted extending the time to gather signatures on nominating petitions beyond statutory time were dissolved. (The District Court Opinion and Order is printed at 349 F.Supp. 1272 and may be found in the Appendix A at page 17 of Petitioners Jurisdictional Statement).

The Memorandum Order and Judgment in *Hainsworth v. Bullock*, Civil Action No. A 72-CA-111 was entered by the Court on September 19, 1972, dismissing the Complaint. [The Memorandum Order and Judgment is contained in Petitioners Jurisdictional Statement in the Appendix thereto at pages 11 and 12. Portions of Memorandum Opinion and Order Denying Motion for Rehearing are set out in Appendix to Jurisdictional Statement at pages 13 through 18 and 19 through 21].

Notices of Appeal were given by all parties except Raza Unida Party and the Record and Jurisdictional Statement was docketed in this Court for all cases except *Hainsworth* under the *American Party of Texas v. Bob Bullock*, on December 15, 1972, in the Supreme Court of the United States, October Term, 1972, No. 72-887. Said Record and Jurisdictional Statement was docketed in this Court for *Robert Hainsworth v. Mark White* on December 30, 1972, in the Supreme Court of the United States, October Term, 1972, No. 72-942.

This Court granted Appellee's request to file a joint Motion to Dismiss or Affirm and also a joint Appellee's Brief herein.

Hainsworth, independent candidate representing himself, who challenge the constitutionality of Article 13.50 of the Texas Election Code applying to independent candidates.

ARGUMENT AND AUTHORITIES

The Memorandum Opinion of the Three-Judge District Court is reported as *Raza Unida Party v. Bullock*, 349 F.Supp. 1272 (W.D. Tex. 1972) and is reproduced in the Jurisdictional Statement of the Appellants in Cause No. 72-887 at pages 17-36 filed in this Court. In *Hainsworth v. Bullock*, the Memorandum Order and Judgment of the same Three-Judge Court is found on page 11 of the Jurisdictional Statement in Cause No. 72-942 filed in this Court.

Appellee, the present Secretary of State of Texas, Mark White, Jr., relies upon the holding, the reasoning, and the authorities cited in the Memorandum Opinion first referred to above reproduced in the Jurisdictional Statement at pages 17-36 of the Appellants in Cause No. 72-887. Quoted from the Opinion at Page 19 is the basic holding in both causes:

"This is another one of those cases where we as Judges are expected to don the 'awesome mantle of omnipotence and unerring clairvoyance' to determine if Texas legislation operates to unconstitutionally burden the rights of voters, political parties, and their candidates. While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process and those on the other end which do not, this case presents a new combination which falls squarely in the middle. Because we believe that courts should

QUESTIONS PRESENTED

The Briefs of the different Appellants present different viewpoints and ideas of what the basic questions presented for the consideration of the Court are, but Appellee believes that the following questions clearly present the basic questions which have been raised in each of the Appellants' Briefs for the consideration of this Honorable Court:

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?
2. Are the provisions of Article 13.45 (2), which prohibit the circulation of the petitions until the day following the primary elections, constitutionally impermissible?
3. Are the provisions of Article 13.45(2), which prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

4. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the secretary of state within a 55 day period, constitutionally impermissible?
5. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petitions, constitutionally impermissible as being too burdensome?
6. Whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional.
7. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissible?
8. Are the provisions of Article 13.50 of the Texas Election Code, which require that the application of an independent candidate for district office have a certain percent of signatures of the total number who voted for governor at last general election in that district but not to exceed 500 signatures, constitutionally impermissible?
9. Are the provisions of Article 13.45(2) of the Texas Election Code, which require that signers of the petitions be currently registered voters, constitutionally impermissible?

**THE METHODS PROVIDED IN THE
TEXAS ELECTION CODE TO
NOMINATE CANDIDATES
TO BALLOT FOR
GENERAL ELECTION IN TEXAS**

Texas, under the Texas Election Code, provides the

to permit a party to be included on the general election ballot, pursuant to the provisions of Article 13.45(2), was approximately 22,000.

The challenge is argued by Appellants that the 1% requirement of Article 13.45(2) is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Appellants, in this connection, seem to rely completely upon the decision in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). However, it should be noted that in *Williams v. Rhodes*, the percentage involved for ballot position was 15%—not the 1% requirement required in Texas. In addition, in *Williams v. Rhodes*, added to the percentage requirement, were the additional requirements that the signers of the petitions had to have voted for the majority of the party's candidates at the last election or had never voted before, and the delegates elected to the national convention were only eligible if they had not voted in another party's primary election within the last 4 years.

Williams v. Rhodes dealt with a situation where the Court readily recognized that the overall scheme of the Ohio election laws was to deny ballot position to all but the Democratic and Republican parties. In fact, the Court in *Williams v. Rhodes*, even made mention of the lenient 1% requirements found in most of the states. At the time of the decision in *Williams v. Rhodes*, 42 states had requirements of 1% or less and 49 states had requirements of 5% or less.

At this point it would be helpful to review some of the decisions since *Williams v. Rhodes*. In *Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262, appeal dismissed, 31 L.Ed.2d 227, 91 S.Ct. 1161 (1970), a 7% requirement was

JURISDICTION

The necessary jurisdictional requirements were met pursuant to the provisions of 28 U.S.C., Sec. 2281, to require the convening of a three-judge court to determine the issues. However, it is questioned by Appellee that any substantial federal question is presented for adjudication by the Supreme Court of the United States which have not been previously resolved by this Honorable Court.

Furthermore, Appellee contends that the Memorandum Opinions, Judgments and Orders entered by the Three-Judge Court in these causes should be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

CONSTITUTIONAL PROVISIONS

The First and Fourteenth Amendments to the United States Constitution are the constitutional provisions relied upon by Plaintiffs in trial before the Three-Judge Court.

STATUTES INVOLVED

Pertinent provisions of the *Texas Election Code* involved are as follows:

1. Article 13.45(2)
2. Article 13.50
3. Article 13.47a
4. Article 6.02
5. Article 13.09(b)
6. Article 13.11a
7. Article 13.08c-1

exercise restraint in overturning state laws unless clearly unconstitutional, we find that the totality of the Texas Election Code serves a compelling state interest and does not operate to suffocate the election process. Accordingly, we deny all relief requested by plaintiffs."

The Raza Unida Party and the Socialist Workers both were able to meet all requirements of Article 13.45(2) of the Texas Election Code and both were certified by the Secretary of State of Texas to be placed on the ballot for the November general election on August 8, 1972.

The Three-Judge Court in the Memorandum Opinion entered in San Antonio on September 15, 1972, found that the Raza Unida Party and the Texas Socialist Workers Party now lack the requisite "personal stake in the outcome" necessary to preserve jurisdiction in this Court. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968).

The Raza Unida Party did not appeal. It is the position of Appellee that Appellant Socialist Workers Party now lacks the requisite personal stake in the outcome of this appeal and should be dismissed, and Appellee so moves.

1. ARE THE PROVISIONS OF ARTICLE 13.45(2), WHICH REQUIRE THAT BEFORE THE NOMINEES OF ANY NEW POLITICAL PARTY OR A POLITICAL PARTY, WHOSE NOMINEE FOR GOVERNOR AT THE LAST GENERAL ELECTION RECEIVES LESS THAN 2% OF THE TOTAL VOTE CAST FOR GOVERNOR OR A PREVIOUSLY EXISTING PARTY WHICH DID NOT HAVE A NOMINEE FOR GOVERNOR IN THE LAST GENERAL ELECTION, CAN BE PLACED UPON THE GENERAL ELECTION

BALLOT THERE MUST BE A SHOWING THAT THE NUMBER OF PEOPLE PARTICIPATING IN THE PARTY'S PRECINCT CONVENTIONS OR SIGNING PETITIONS TO HAVE THE PARTY'S NOMINEES ON THE GENERAL ELECTION BALLOT WAS AT LEAST 1% OF THE VOTE FOR GOVERNOR AT THE LAST GENERAL ELECTION, CONSTITUTIONALLY IMPERMISSIBLE?

Even though the Raza Unida Party and the Texas Socialist Workers Party met all of the provisions of Article 13.45(2) and were certified by the Secretary of State to be on the November, 1972, general election ballot, Appellants are still challenging the provisions of Article 13.45(2) of the Texas Election Code, which require that before the nominees of (1) any new political party, (2) or a political party whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, (3) or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot there must be filed with the Secretary of State a list of the participants in precinct conventions held by the party in an aggregate number of at least 1% of the total votes cast for governor at the last general election, or if that number is less than 1%, there must be filed with the precinct convention lists petitions requesting that the party's nominees be placed upon the general election ballot which are signed by a sufficient number of qualified voters to make a combined total of at least 1% of the total vote cast for governor at the last general election.

For the election year 1972, the number of qualified voters attending precinct conventions or signing petitions

following four alternative methods of nominating candidates to the ballot for a general election:

1. Candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election, may be nominated by primary election only.
2. Candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor, may be nominated by primary election only.
3. Candidates of parties whose candidates polled less than 2% of the total gubernatorial vote in the last general election, and parties who did not have a nominee for governor in the last general election, may be nominated by convention only, or by fulfilling additional requirements set out in Article 13.45(2) of the Texas Election Code.
4. Nonpartisan and independent candidates' names may be printed on the ballot after fulfilling the qualifications set out in Article 13.50 of the Texas Election Code.

In the consolidated cases tried before the Three-Judge Court in San Antonio on September 7, 1972, Plaintiffs Raza Unida Party (not an Appellant), the American Party of Texas, the Socialist Workers Party, and the Texas New Party all fall into the above third category. Therefore, the thrust of the three Appellants' attack goes to the constitutionality of Article 13.45(2) of the Texas Election Code.

The other Appellants are Laurel N. Dunn, representing himself and other independent candidates, and Robert

held invalid. However, in *Wood v. Putterman*, 316 F.Supp. 646, affirmed 400 U.S. 859, 91 S.Ct. 104, 27 L.Ed.2d 99 (1970), a 3% requirement was upheld, wherein the Court stated that:

"... The limitation of easier access to the ballot to parties which have demonstrated active participation and some measure of success at the last preceding general election does not seem an unreasonable safeguard against these undesirable consequences, especially when the petition procedure by which a new political party may gain access to the ballot is not particularly onerous. ..."

In the case of *Jones v. Hare*, 440 F.2d 685 (1971), the challenged statute was upheld which required 1% of the total vote cast for the successful candidate for Secretary of State at the last general election. The Court in its opinion stated that:

"The Michigan Election Law does provide an official ballot listing as a matter of right for the candidates of political parties which have polled over a certain minimal amount of votes in the last regularly scheduled general election... any other person may be placed upon the ballot who receives the signatures of at least one percent of the votes cast for the successful candidate for Secretary of State in the last preceding election. As part of the process the Michigan laws impose certain reasonable time limitations and procedural steps including the nominal formation of a so-called 'political party.' We find that each of these requirements is a reasonable attempt by the State of Michigan to provide ready access to its official ballot to any person who has the support of a minimally significant number of qualified voters. ..."

In *Lyons v. Davoren*, 402 F.2d 890, cert.denied, 393 U.S. 1081, 89 S.Ct. 861, 21 L.Ed.2d 774 (1968), a 3% requirement of the total votes cast in the last gubernatorial election to get on the general election ballot was upheld. In *Moore v. Board of Elections for District of Columbia*, 319 F.Supp. 437 (1970), a 2% requirement was upheld, and the Court stated in its opinion that:

"...Congress properly recognized the need to limit candidates' access to the ballot through a process of petitions, primaries, and runoffs in order to minimize confusion and ensure that voters in the final election are presented only with candidates who have substantial support in the community. In fashioning such a process, Congress had to establish some balance between the competing goals of guaranteeing access to the ballot by qualified candidates, and limiting the field of candidates in the general election to a manageable number. The Court may not substitute its own judgment for that of Congress in determining the optimum resolution of these factors, but must inquire only whether the provisions... place unreasonable restrictions on independent candidates or arbitrarily discriminate against indigents in favor of candidates from major parties."

Lastly, in *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Jackson v. Ogilvie*, 325 F.Supp. 861, affirmed 403 U.S. 925 (1971), a 5% requirement for ballot position was upheld.

A review of the foregoing cases makes it most clear that the Appellants' allegation that the 1% requirement in Texas, pursuant to the provisions of Article 13.45(2), for ballot position for nominees of a new or relatively small political party is constitutionally impermissible, is com-

pletely lacking in merit. Only when the percentage requirement has risen to 15% and 7%, have the courts struck the enactments down. In turn, on numerous occasions the courts have upheld, as constitutionally valid, percentage requirements ranging from 1% to 5%. Even in the landmark case of *Williams v. Rhodes*, the Court noted the lenient 1% requirements of the vast majority of the states.

Certainly, there is nothing constitutionally impermissible about the requirements of Article 13.45(2) of the Texas Election Code which provide that certain new, small or inactive political parties have to show some minimal support of the voters before being entitled to have their nominees placed upon the general election ballot. Nothing in *Williams v. Rhodes*, or the cases which have followed indicate that the minimal 1% requirement in Texas places an unconstitutional burden on the right to vote or to freely associate.

2. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH PROHIBIT THE CIRCULATION OF THE PETITIONS UNTIL THE DAY FOLLOWING THE PRIMARY ELECTIONS CONSTITUTIONALLY IMPERMISSIBLE?

The Appellants have next challenged those provisions of Article 13.45(2) of the Texas Election Code, which require that the petitions for signatures to place a party's nominees on the general election ballot cannot be circulated for signatures until the day after the primary elections are held.

First, let us consider some of the practical reasons for such a requirement. If the party seeking a ballot position is

an active one with even minimal voter support, their precinct convention attendance should satisfy, or come close to satisfying, the 1% requirement. As these precinct conventions are also held on the same day that the primary elections are being held each party would have an equal opportunity to attract the voter to its political process—be it precinct convention or primary election. As there would be no need for the circulating of petitions if the precinct conventions obtain the required 1% participation it would seem to logically follow that the circulating of petitions should be delayed until after the precinct conventions. This would not only encourage voter participation in the party's general affairs but would also have the voter participate in the party's nomination of candidates. The petitions are merely a way in which a party may supplement its precinct convention attendance if it falls below the 1% requirement. To allow it to commence prior to the precinct conventions would not only discourage voter participation in the vital business of the precinct convention, but it would be doing a useless thing if the attendance at the precinct conventions equaled or exceeded the 1% requirement.

In addition, there are other reasons for requiring that petitions not be circulated until after the precinct conventions and primary elections. If the petitions are circulated well in advance of the precinct conventions and primary elections, the political issues and the political stands of the various parties may not have crystallized or taken shape and should a voter sign a petition at this time he would become fenced in to the extent that he could not change his mind and participate in the political process of another party more to his liking. Also, by delaying the petition circulating process until after the primary elections there is a great deal less likelihood that individual voters will

become engaged in the party process of more than one political party. A petition signed well in advance of primary elections and precinct conventions may be forgotten or its significance ignored.

The entire purpose of the petition process is merely to supplement any deficiency in the percentage requirement of the precinct convention attendance, and to allow its commencement prior to the primary elections and precinct conventions is to ignore the very reason for its very existence.

That such an arrangement does no violence to the Constitution of the United States is evident by the decision in *Moore v. Board of Elections for District of Columbia*, 319 F.Supp. 437 (1970), where a challenged statute was upheld against assertions that:

"... complaint points to the fact that independent candidates must obtain more signatures for nomination than primary candidates; that they must solicit signatures later than primary candidates; and that they may be foreclosed from obtaining signatures from registered voters who have already signed a nomination petition for a primary candidate. ..."
(Emphasis added).

The use of petitions to meet the 1% requirement of Article 13.45(2) is a supplemental assistance for small or new parties seeking a ballot position for their nominees—not a detriment or obstacle as Appellants would suggest.

3. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH PROHIBIT A PERSON FROM SIGNING SUCH PETITIONS WHO HAS PARTICIPATED IN ANY OTHER PARTY'S PRIMARY ELEC-

TION OR CONVENTION DURING THE CURRENT VOTING YEAR, CONSTITUTIONALLY IMPERMISSIBLE?

Article 13.45(2) prohibits a person from the signing of the petition to obtain ballot position for a political party if such person has participated in another party's primary election during the current voting year. The Appellants have seemingly taken the position that this requirement in some way conflicts with the decisions in *Williams v. Rhodes*, and *Jenness v. Fortson*, 403 U.S. 431 (1971). However, in *Williams v. Rhodes*, the restriction upon dual party participation extended beyond the current voting year, and made the transfer of party loyalty extremely difficult if not impossible for small or new parties. In Texas, however, no such lingering restriction exists and a voter may change from year to year his participation in party activity. In *Jenness v. Fortson*, the Court merely mentioned that in Georgia a voter could sign the petitions of more than one political party in a given voting year, but certainly did not indicate that this was some sort of constitutional right or that such action was proper.

Of extreme importance in this connection is the case of *Jackson v. Ogilvie*, 325 F.Supp. 861, affirmed, 403 U.S. 925 (1971), which was affirmed by the Supreme Court on the same day as its decision in *Jenness v. Fortson*. The Court in *Jackson v. Ogilvie* had before it the same issue as here in connection with state statutes prohibiting participation by voters in more than one political party's election process, and the Court held in its opinion that:

"... *Baker* requires that one elector must have one vote. Under the Illinois Election Code an elector is offered an option. He may sign a petition for an

independent candidate. If he signs such a petition he is not qualified to vote in a primary election for a candidate seeking the same office as the independent who he supports . . . Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. *He cannot have it both ways.* Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*. . . . " (Emphasis added).

In the case of *Lester v. Board of Elections for District of Columbia*, 319 F.Supp. 505 (1970), the Court held:

" . . . The Court's decision, however, does not touch the requirement prohibiting registration thirty days prior to the election. . . This period of time is necessary for administrative tidiness, to insure the purity of the vote *and to prevent dual registration and dual voting.* . . . " (Emphasis added).

In the case of *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held that:

" . . . that portion of Section 138 which discounts the signature of a voter who has voted at a primary election which a candidate was nominated for an office for which the nominating petition purports to nominate another candidate, *can be justified by the compelling State interest* to preserve inviolate the sanctity and secrecy of the ballot. Since the State cannot determine which candidate a particular voter selects in the primary or whether he has in fact selected only some of the proffered candidates, this provision can be justified under the percent teachings of the Supreme Court . . . The purpose of Section

138(6) is to limit each voter to but a single choice for office . . . a permissible State interest in assuring that each independent party is supported by 12,000 different qualified voters. . . ." (Emphasis added).

See also *Wood v. Puttermann*, 316 F.Supp. 646, affirmed 91 S.Ct. 104, 400 U.S. 859, 27 L.Ed.2d 99 (1970), and *Moore v. Board of Elections for District of Columbia*, *supra.*, where similar provisions were upheld.

The recent cases of *Rosario v. Rockefeller*, 258 F.2d 649 (1972) and *Pontikes v. Kuser*, 40 L.W. 2648 (1972-March 7), have also dealt with this issue. In *Pontikes*, the state laws provided for a prohibition against voting in a primary election if the voter had voted in another party's primary in the last 23 months—a situation more akin to *Williams v. Rhodes* than the requirements of Article 13.45(2) enacted by the Legislature of Texas. The Court in *Pontikes* commented upon the state's interest in the prevention of "raiding" in the political party process of the state but felt that the method to prevent this was too broad in operation—it impeded both deceptive conduct and constitutionality protected activities.

In *Rosario*, a more limited "raiding" statute, similar to that of Texas, was upheld. The Court noted in *Rosario* that the political parties of the United States stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office, and that the entire political process in this country depends largely upon the satisfactory operation of these institutions. The Court felt that the efficiency of the party system in a democratic process would be seriously impaired if members of one party were entitled to interfere and participate in opposite party's affairs.

In the instant case, there is a complete lack of the broad sweeping restriction found in *Williams v. Rhodes* and *Pontiles v. Kusper*. The only restriction is one of giving the voter an option during the current election year—that of deciding which particular political party he wished to support and participate with—an option or restriction upheld as not only a valid but a compelling state interest by *Jackson v. Ogilvie*, *Socialist Workers Party v. Rockefeller*, *Wood v. Putterman*, *Moore v. Board of Elections for District of Columbia*, and *Rosario v. Rockefeller*.

4. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH REQUIRE THAT THE SIGNATURES ON THE PETITIONS MUST BE SECURED AND FILED WITH THE SECRETARY OF STATE WITHIN A 55 DAY PERIOD, CONSTITUTIONALLY IMPERMISSIBLE?

The Appellants have also challenged the time limit specified by Article 13.45(2) for the obtaining of signatures on the petitions and such petitions being filed with the Secretary of State. Under the provisions of Article 13.45(2), a period of approximately 55 days is allowed to circulate and obtain signatures upon the petitions and file them with the Secretary of State. As noted by Appellants, this process must be completed approximately 90 days prior to the general election in November.

Appellants' challenge is based entirely upon the desire to have the 55 day period extended, and presumably to a date nearer the general election date.

Appellants have seemingly ignored some of the basic reasoning behind the provisions they have challenged. First, as has been discussed previously, the use of petitions

is merely a manner provided to supplement the obtaining of the required percentage at the precinct conventions. An active, going political party should be able to obtain, or nearly so, the 1% requirement by attendance at its precinct convention. A failure to obtain the minimal 1% requirement at precinct conventions, and in the 55 days thereafter by the circulating of petitions, would merely be a significant indication that the political party involved lacked voter support or initiative.

Also, the checking of the petitions is a difficult and time consuming task which must be complete in sufficient time to allow not only the printing of the ballot, but any legal contests which might arise in connection with the Secretary of State certifying or denying certification on the ballot of a particular political party. In this connection Article 1.03(2) of the Texas Election Code requires the Secretary of State to certify the candidates nominated for office to the county clerks at least 30 days prior to the general election. Because of the necessity for taking printing bids for the ballots, the foregoing is a duty which is normally attempted to be performed well in advance of the 30 day period specified.

Aside from the foregoing justifications, the decisions of the courts give little encouragement to Appellants' position. In *Moore v. Board of Elections for the District of Columbia*, 319 F.Supp. 437 (1970), the Court upheld a statute which allowed only 54 days to obtain the required signatures on a similar type petition.

In *Tansley v. Grasso*, 315 F.Supp. 513, affirmed 91 S.Ct. 927, 401 U.S. 928, 28 L.Ed.2d 210 (1970), the Court stated:

"State statutes validly enacted are presumed to be constitutional . . . It is the plaintiffs' burden, if they are to prevail, to demonstrate the invidious discrimination they have alleged. . . .

" . . .

" . . . The state has an interest in not having wide open primaries, wherein anyone can run who so desires. Such a procedure would lead to excessive cost and confusion, without any showing that the contestant had a substantial, or even any support within his own party . . . The state does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part. . . .

" . . .

" . . . The present case deals with that type of minor difference which *Williams* does not proscribe. The states have broad discretion in formulating election policies. *Williams v. Rhodes*, supra, at 34, 89 S.Ct. 5; *United States v. Classic*, 313 U.S. 299, 311, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Voorhes v. Dempsey*, 231 F.Supp. 975, 977 (D.Conn. 1964) (three-judge court). The statutes herein challenged represent a valid exercise of that discretion. It may well be that the plaintiffs have strong feelings that this legislative distinction creates an unnecessary burden upon prospective candidates for public office, however, if their claim has any merit their proper forum is before the state legislature. The Plaintiffs have shown no invidious discrimination. . . . "

In *Briscoe v. Kasper*, 435 F.2d 890 (1970), the Court stated in its opinion:

" . . . A state clearly has a substantial interest in

administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption. In this instance, the chief purpose of the limitation is to reduce the electoral process to manageable proportions by confining ballot positions to a relatively small number of candidates who have demonstrated initiative and at least a minimal appeal to eligible voters. . . .”

In *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held that:

“ . . . the State is not powerless to fix reasonable standards or requirements for a position on the ballot so that multifarious political associations with little or no popular support do not bemuse the electoral process. The use of nominating petitions by independent political parties to obtain a place on the ballot has long been recognized as an example of such a reasonable requirement for obtaining a ballot position and as an integral part of the election process. . . .”

In *Wood v. Putterman*, 316 F.Supp. 646, affirmed 91 S.Ct. 104, 400 U.S. 859, 27 L.Ed.2d 99 (1970), the Court stated:

“ . . . The limitation of easier access to the ballot to parties which have demonstrated active participation and some measure of success at the last preceding general election does not seem an unreasonable safeguard against these undesirable consequences, especially when the petition procedure by

which a new political party may gain access to the ballot is not particularly onerous. . . .”

In *Jones v. Hare*, 440 F.2d 685 (1971), it is stated that:

“ . . . As part of the process the Michigan laws impose certain reasonable *time limitations and procedural steps* . . . We think that each of these requirements is a reasonable attempt by the State of Michigan to provide ready access to its official ballot to any person who has the support of a minimally significant number of qualified voters. . . .” (Emphasis added).

The foregoing authorities indicate beyond question that the Appellants’ position as to this issue is completely lacking in merit. Besides the administrative and procedural need and justification for such requirement, it in turn serves as an indication of whether the political party seeking a ballot position has at least minimal support among the voters—a purpose recognized on numerous occasions by the Courts since *Williams v. Rhodes* as being both a legitimate and compelling state interest and justification.

5. ARE THE PROVISIONS OF ARTICLE 13.45(2), WHICH REQUIRE THE ADMINISTERING OF A PRESCRIBED OATH TO THOSE SIGNING THE PETITIONS’ CONSTITUTIONALLY IMPERMISSIBLE AS BEING TOO BURDENSOME?

It is somewhat difficult to ascertain just what objection the Appellants are making in connection with the requirements of Article 13.45(2) as concerns the administering of a prescribed oath to those signing the petitions. Other than the allegation that it is burdensome, the exact nature of

the complaint is hazy and obscure. The challenged requirement provides that:

"... To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition; 'I know the contents of the foregoing petition, requesting that the names of the nominees of the _____ Party be printed on the ballot for the next general elections. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party.' ...

The foregoing oath could undoubtedly be shortened somewhat, but this avoids the real issue. At what length in verbage did it become constitutionally impermissible as Appellants allege? Is the validity of a statutory enactment of the Legislature of the State of Texas to fall before some vague constitutional mandate demanding terseness? Possibly such questions prompted the Court's statement in *Valenti v. Rockefeller*, 292 F.Supp. 851, affirmed 89 S.Ct. 689, 393 U.S. 405, 21 L.Ed.2d 635, which is set forth as follows:

"... We are aware of the importance of the right to vote in this country's general scheme of constitutional government. See *Williams v. Rhodes*... We are also aware of the basic principle of federalism which requires that a federal court exercise great caution before striking down a state statute as repugnant to the Constitution. ..."

It is impossible to ascertain if the Appellants also object to the necessity of the signatures to the petitions being

sworn to, but in any event, this argument or position would be as lacking in merit as the foregoing and for the same reason. In addition, the notion that the United States Constitution empowers the federal court to judge the wisdom of the means by which a state undertakes to further legitimate interest has long been rejected by the United States Supreme Court. Federal courts are not empowered to sit as a "super-legislature to determine the wisdom, need and propriety of laws." *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876). The United States Constitution does not give the federal courts the power to judge the wisdom of the legislative choice and turn the court's disagreement with that choice into a constitutional prohibition. *Beauharnias v. Illinois*, 343 U.S. 250, 72 S.Ct. 725 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 653 (1955).

6. WHETHER THE McKOOL-STROUD PRIMARY FINANCING BILL OF 1972 IS UNCONSTITUTIONAL?

One of the groups of Appellants in this proceeding has raised the issue of whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional and invalid. In the trial brief filed by this group of Appellants in connection with this issue, the sole challenge to this statutory enactment by the Legislature of the State of Texas is that it is "... void and unconstitutional under the Texas Constitution."

If this group of Appellants wish to raise a question dealing with the validity of the enactment upon State constitutional grounds, then Appellees respectfully submit that they have chosen the wrong forum. The state courts of Texas are the proper tribunal to litigate this issue—not the federal courts. It is for the State courts to determine State law—not the federal courts. However, the entire argument of Appellants is answered by *Bullock v. Carter*, 31 L.Ed.2d 92 (1972) and *Bullock v. Calvert*, 480 S.W.2d 367 (Tex.Sup. 1972), and the authorities in these cases. In *Bullock v. Calvert*, The Texas Supreme Court upheld the authority of the Legislature to provide for State financing of party primaries and the McKool-Stroud Primary Financing Law of 1972 was enacted as a direct result of the holding in *Bullock v. Calvert*, as well as *Bullock v. Carter*.

It was recognized by the United States Supreme Court in *Bullock v. Carter* that the State financing of primary elections is a legitimate state objective.

In *Bullock v. Calvert*, the Supreme Court of Texas held that the Constitution of Texas requires legislative authorization and appropriation for the expenditure of public funds for this purpose. The primary financing law here challenged was enacted in order to provide pre-existing law within the meaning of Section 44 of Article III of the Texas Constitution for the expenditure of State funds for the financing of primary elections.

Now for the first time on appeal Appellants challenge the McKool-Stroud Primary Financing Bill of 1972 on the grounds that it is impermissible under the Constitution of the United States upon the grounds that financial assistance is given to those political parties required to hold

U.S. at 32. "Plaintiffs admitted in oral argument that they did not attempt in any way to comply with the provisions of Article 13.50."

Appellant, Robert Hainsworth, an independent candidate for district office makes the same challenge to Article 13.50 of the Texas Election Code in Cause No. 72-942 in the Court. He apparently made an effort to secure the required signatures but fell short of the minimum 500 signatures required due to apparent lack of support.

On page 12 of Appellant Hainsworth's Jurisdictional Statement, Cause 72-942 in this Court, cited from the Three-Judge Court's Memorandum Opinion:

"For the same reasons stated by us in *Raza Unida Party, et al. v. Bob Bullock, et al.*, supra, this Court finds that Article 13.50 serves a compelling state interest and is not violative of Equal Protection as applied to this Plaintiff."

9. ARE THE PROVISIONS OF ARTICLE 13.45(2) OF THE TEXAS ELECTION CODE, WHICH REQUIRE THAT SIGNERS OF THE PETITIONS BE CURRENTLY REGISTERED VOTERS, CONSTITUTIONALLY IMPERMISSIBLE?

This issue raised by Appellants was recently resolved adversely to Appellants' position in the case of *Gaunt v. Brown*, 40 L.W. 2680 (U.S.D.C. Ohio, decided April 6, 1972). While dealing with a somewhat different situation, that of an individual not being able to register or vote right at the time of the primary elections, the principles would be equally applicable to the issue here presented.

Also in the case of *Socialist Workers Party v. Rocke-*

"... The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

"... We can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizational paraphernalia required of a 'political party' as a condition for conducting a primary election... there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike a truism will illustrated in *Williams v. Rhodes*. ..."

Finally, the decision in *Bullock v. Carter* recognizes that the State does not necessarily have to finance all aspects of the election process no matter how small the voter support. The Court in its opinion stated that:

"... the Court has recently upheld the validity of

a state law distinguishing between political parties on the basis of success in prior elections . . . We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries. . . .”

The foregoing was in direct reference to the State's argument that just the type of challenge here presented would result if the State were required to finance the primary election process. The only conclusion that can be drawn from the Court's statement is that they anticipated that only those political parties required to engage in the expensive primary elections would receive State financial aid.

Consequently, the Appellees submit that this challenge of Appellants is also lacking in merit.

7. IS THE REQUIREMENT THAT A PERSON FILE HIS INTENTION TO BECOME A CANDIDATE THREE MONTHS IN ADVANCE OF THE PRECINCT CONVENTIONS SO BURDENSOME AS TO BE CONSTITUTIONALLY IMPERMISSIBLE?

The foregoing issue raised by the Appellants has already been determined adversely to Appellants' position in the case of *Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262, appeal dismissed, 31 L.Ed.2d 227, 92 S.Ct. 1161 (1970), where the Court stated:

“ . . . The state has an interest in having persons who otherwise qualify for ballot positions officially become a candidate at a designated time prior to an election. In addition, the state may reasonably require that all persons seeking elective office become

"... It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. ..."

The Three-Judge District Court was correct in finding that the Texas Election Code is not comprised of "an entangling web of election laws" of the type referred to by Mr. Justice Douglas and invalidated in *Williams v. Rhodes*, 393 U.S. at 35.

The Texas Election Code does not operate to "freeze the status quo" since two minority parties met the requirements and were certified to the general election ballot in Texas in 1972.

As the Court stated in conclusion:

"After close scrutiny, this Court cannot say that, in serving its compelling interest, Texas has chosen the way of greater interference in establishing alternative routes to the ballot." *Dunn v. Blumstein*, 405 U.S. at 343.

WHEREFORE, PREMISES CONSIDERED, Appellee, Mark White, Jr., Secretary of State of Texas, prays that this Honorable Court will refuse jurisdiction because Appellants have failed to present a substantial federal question which has not been previously decided by this Court, and in the alternative Appellee submits that the allegations raised by Appellants are totally lacking in merit and the relief sought should be denied and the Judgments of the Three-Judge District Court should in all things be affirmed.

primary elections, but unavailable to those parties which nominate candidates by conventions.

First, one need only look to the decision in *Bullock v. Carter* to ascertain the large expense entailed in conducting a party primary election. The printing of ballots, leasing of voting machines, and employment of various election officials on a state-wide basis is a major expenditure for even the State. The appropriation in the McKool-Stroud Primary Financing Bill of 1972 is ample evidence—along with the fact that actual expenditures exceeded the legislative estimate by a considerable amount. However, the convention and petition procedure available for small or new parties carries with it none of the expensive election requirements and there exists no need for expenditures of state funds for political groups which may have little if any voter support. If, however, they reach a size where they are forced to conduct primary elections they will, in turn, be the recipients of the State's financial assistance.

That such an arrangement is constitutionally permissible is evidenced by the case of *Jenness v. Fortson*, 403 U.S. 431 (1971), where the United States Supreme Court held that:

“... any political body that wins as much as 20% support at an election becomes a ‘political party’ with its attendant ballot position rights and primary election obligations, and any ‘political party’ whose support at the polls falls below that figure reverts to the status of a ‘political body’ with its attendant nominating petition responsibilities and freedom from primary election duties. ...

feller, 314 F.Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held:

“... The purpose of Section 138(6) is to limit each voter to but a single choice for office... a permissible State interest in assuring that each independent party is supported by 12,000 different *qualified* voters...” (Emphasis added).

The Appellee has tried to answer all of the major challenges to the Texas Election Code from the three Appellants' briefs filed.

Some challenges were made in which the Three-Judge District Court correctly found that the Appellants making such challenges either never did have or now lack the requisite “personal stake in the outcome” necessary to preserve jurisdiction in the Court. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969).

The challenge was made to the Texas Election Code as a whole because it does not provide absentee balloting for minority parties and independent candidates. This was answered by the Three-Judge District Court by *McDonald v. Board of Elections*, 394 U.S. 902, 807 (1969) holding that the traditional rational basis standard rather than the more exacting compelling interest test should be used in evaluating classification involving absentee ballot provisions.

Anyway, as shown above in *Flast v. Cohen*, *supra*, the only Appellant to make the challenge because of lack of absentee balloting was the American Party and they did not have the personal stake in the outcome since they were not on the ballot.

A group of people associated together for political purposes do not become an official party in Texas until statutory requirements are met. The law must have minimum guidelines and such a group must meet those minimum guidelines (such as having popular support sufficient to form a political party). The State has a necessary interest in setting those minimum guidelines for the formation of an officially recognized political party in Texas.

CONCLUSION

Few, if any grounds have been missed by the Appellants in their efforts to challenge the validity of Article 13.45(2) of the Texas Election Code, and certain related enactments, and basically all of the grounds find their inception in *Williams v. Rhodes*. However, the Appellants have completely failed to recognize or establish the essential criteria set forth by this landmark decision—the watchword of *Williams v. Rhodes* deals with the virtual impossibility of any small or new party being able to obtain ballot position as the constitutionally impermissible impediment to exercising one's voting or associational rights. This is wholly lacking in this case, or in connection with the statutes challenged.

In addition, while the Appellants may have ideas for changes in the Texas election laws that would possibly improve them or make them more attune to their desires and wishes, the fact that there may be better or more desirable ways to accomplish the State's duties and responsibility in the management of elections within the State, are not sufficient grounds to afford the drastic relief sought by Plaintiffs. As the Court stated in *Williams v. Rhodes*:

officially declared candidates on or before a certain date preceding an election. One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process."

8. ARE THE PROVISIONS OF ARTICLE 13.50 OF THE TEXAS ELECTION CODE WHICH REQUIRE THAT THE APPLICATION OF AN INDEPENDENT CANDIDATE FOR DISTRICT OFFICE OBTAIN A CERTAIN PERCENT OF SIGNATURES OF THE TOTAL NUMBER WHO VOTED FOR GOVERNOR AT THE LAST GENERAL ELECTION IN THAT DISTRICT BUT NOT TO EXCEED 500 SIGNATURES, CONSTITUTIONALLY IMPERMISSIBLE?

Appellant, Laurel N. Dunn, independent candidate for the United States House of Representatives, representing himself and other independent candidates challenge Article 13.50 of the Texas Election Code which set out the requirements for independent candidates to get on the general election ballot.

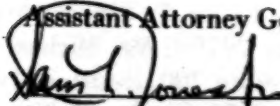
As clearly stated by the Three-Judge District Trial Court in their Memorandum Opinion rendered on September 15, 1972 (Page 33, Appendix A, Appellants' Jurisdictional Statement, No. 72-887 of this Court):

"Other than a general allegation that the requirements are 'unduly burdensome' as to them, Plaintiffs present absolutely no factual basis in support of their claims. We reject outright Plaintiffs' argument that states can impose no additional election requirements other than those found in the United States Constitution." *Bullock v. Carter*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. at 442; *Williams v. Rhodes*, 393

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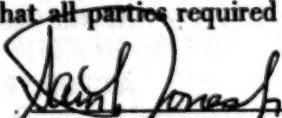
A handwritten signature in dark ink, appearing to read "Sam L. Jones, Jr.", is written over a horizontal line. The signature is stylized with a large initial "S" and "J".

SAM L. JONES, JR.
Assistant Attorney General
Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, Sam L. Jones, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, postage prepaid, and addressed as follows: Mrs. Gloria T. Svanas, 418 West Fourth Street, Odessa, Texas 79760; Mr. Michael Anthony Maness, 711 Main Street, Suite 700, Houston, Texas 77002; Mr. Gerald M. Birnberg, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76706, and Mr. Robert W. Hainsworth. I certify that all parties required to be served are hereby served.



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JUL 18 1973

MICHAEL RODAK, JR., C

In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

Appellants,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee.

No. 72-942

ROBERT HAINSWORTH,

Appellant,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee,

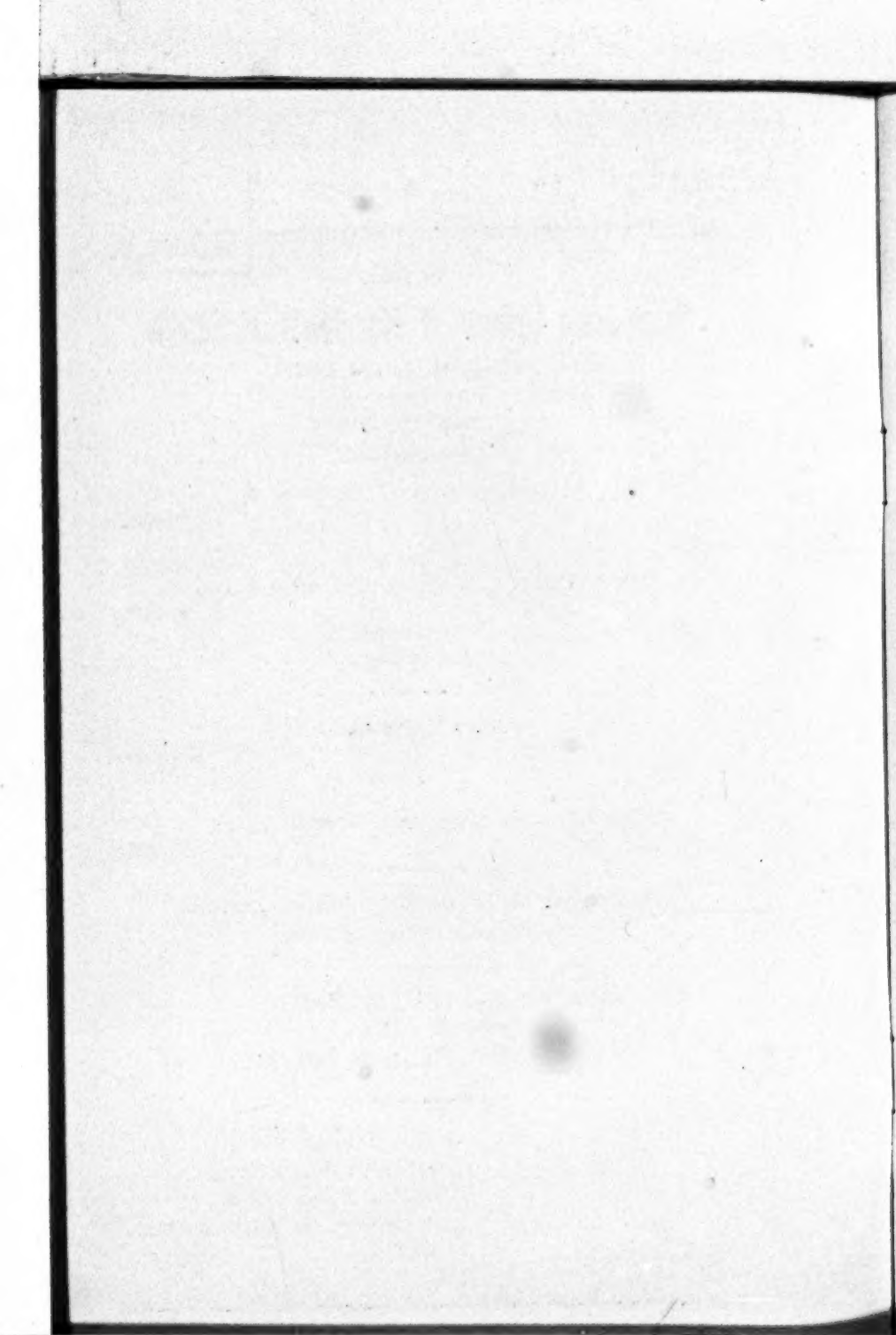
*Appeal from the United States District Court for
the Western District of Texas*

**SUPPLEMENTAL APPENDIX
TO BRIEF FOR APPELLANTS
AMERICAN PARTY OF TEXAS**

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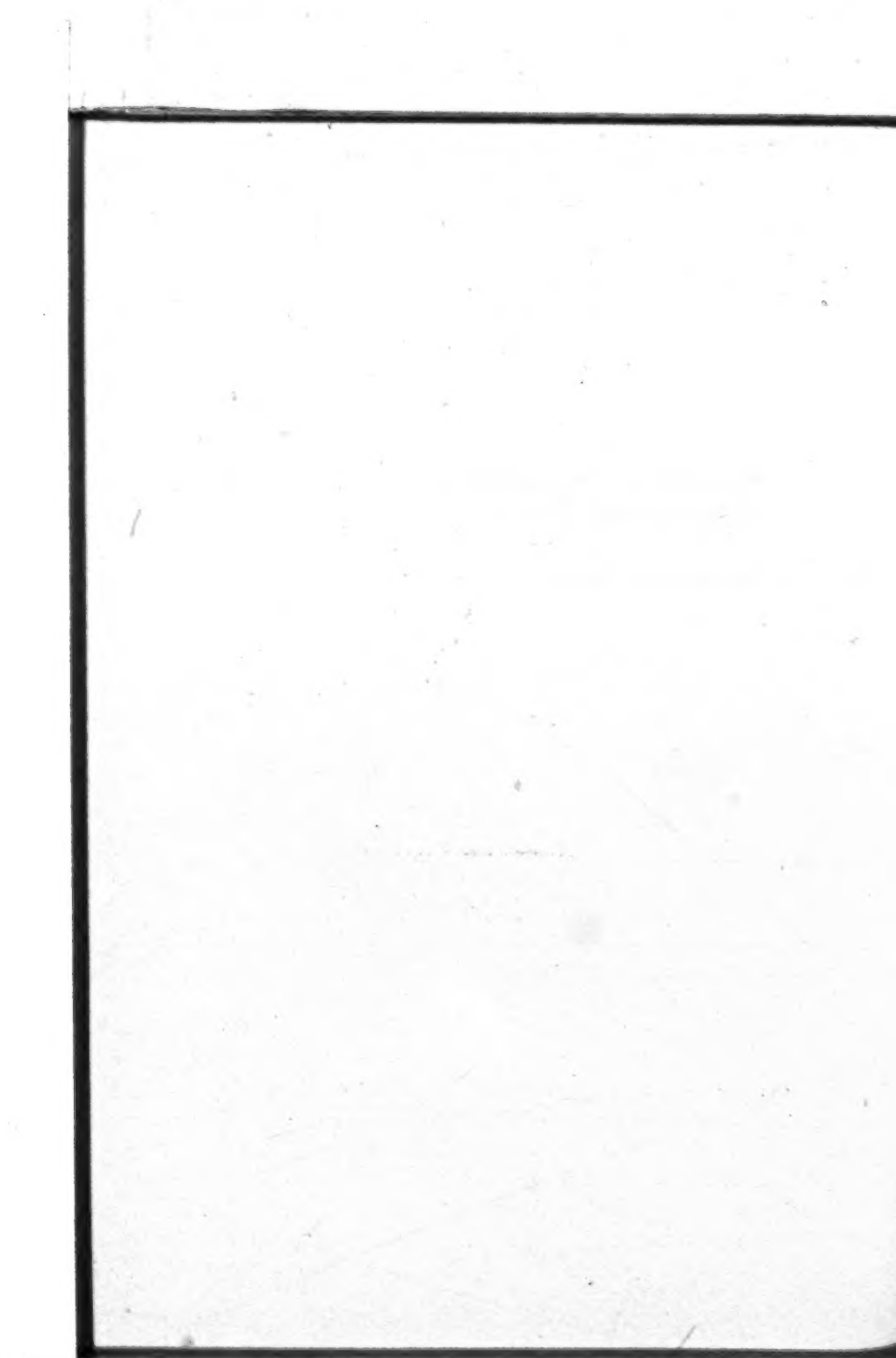
*Attorney for American Party
of Texas.*

June, 1973



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**SUPPLEMENTAL APPENDIX
TO BRIEF FOR APPELLANTS
AMERICAN PARTY OF TEXAS**

TO SAID HONORABLE COURT:

Pursuant to Rule 41 (5), Appellants, the American Party of Texas, respectfully file this Supplemental Appendix to the Brief for Appellant, American Party of Texas, of newly enacted Legislation of controlling character signed by the Governor of Texas on June 15, 1973, and filed in the Office of the Secretary of Texas, on June 16, 1973, at 4:30 P. M.

AN ACT

enacting temporary provisions relating to the conduct and financing of primary elections held in 1974; also enacting permanent provisions relating to the minimum and maximum number of registered voters in a voting precinct, the standards for determining whether a party makes its nominations by primary elections or by conventions, the filing procedure for primary election candidates, and the number of ballots furnished for each voting precinct in primary elections; amending the following sections of the Texas Election Code, as amended: Paragraph (b), Section 12 (Article 2.04, Vernon's Texas Election Code); Section 180 (Article 13.02); Subsection (c), Section 187 (Article 13.09); Paragraph 2, Section 190 (Article 13.12); and Subdivision 1, Section 222 (Article 13.45); and declaring an emergency_____

BE IT ENACTED BY THE LEGISLATURE OF THESTATE OF TEXAS:Section 1. CONDUCT OF THE PRIMARY ELECTIONS

(a) Nominations for the general election to be held on November 5, 1974, shall be made in the manner provided in the Texas Election Code, as amended. The primary elections held by a political party pursuant to Sections 180 and 181, Texas Election Code (Articles 13.02 and 13.03, Vernon's Texas Election Code), shall be conducted through the party's

state executive committee and county executive committees in accordance with the procedures detailed in the Texas Election Code, as amended, with the following modifications and clarifications:

(b) In order for a candidate to have his name placed on the ballot for the general primary election, he must have either paid a filing fee or filed a nominating petition in compliance with Section 1(c) of this Act.

(c) Payment of filing fee:

Every candidate for public office shall accompany his application for a place on the general primary ballot with a filing fee in the amount prescribed in this section, unless he uses a nominating petition prescribed by this section. The schedule of fees is as follows:

1. All statewide offices \$1000
2. United States representative 500
3. State senator 400
4. State representative 200
5. Member, State Board of Education 50
6. Chief Justice or Associate
Justice, Court of Civil Appeals 400
7. District judge or judge of any other
court having status of district office
as classified in Section 61c,
Texas Election Code 400
8. District attorney or criminal

	district attorney	400
9.	All county offices, as classified in Section 61c, Texas Election Code, except county surveyor or inspector of hides and animals	150
10.	County surveyor or inspector of hides and animals	50
11.	County commissioner	100
12.	Justice of the peace or constable, for counties above 200,000 population	100
	for counties under 200,000 population	50
13.	Public weigher	50

In lieu of payment of a filing fee, a candidate may file a nominating petition which must be signed by the qualified voters eligible to vote for the office for which the candidate is running as follows:

For statewide offices, 5,000 signatures.

For district, county, precinct, or other political subdivisions, equal in number to at least two percent of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory. In no event shall the number of signatures required be less than 25 nor more than 500.

No person shall sign more than one nominating petition for the same office. Signing two petitions makes both signatures void.

The nominating petitions must be submitted to the appropriate official with the candidate's application for a place on the general primary ballot.

(d) The fees paid to the county chairman pursuant to Section 1 (c) of this Act and any contributions made to the county chairman or the county executive committee for the specific purpose of helping defray the costs of the primary elections shall be deposited to the credit of the primary fund referred to in Section 196 of the Texas Election Code, as amended (Article 13.18, Vernon's Texas Election Code), and shall be applied to payment of the costs of the primary elections. The county chairman and the committee may also use any other available funds toward defraying the costs. The remaining costs incurred shall be borne by the state in accordance with the procedures outlined in Section 2 of this Act. Within five days after the regular filing deadline, the chairman of the state executive committee shall forward to the secretary of state all filing fees collected pursuant to Section 1 (c) of this Act and an itemized listing of these fees. The secretary of state shall deposit these fees in a suspense account with the state treasury. The secretary of state is authorized to make any refunds pursuant to Section 186b, Texas Election Code, from this fund. The fees collected under any extended deadline shall be sent to the secretary of state before the date of the general primary election. Within five days after the date of the general primary election, the balance remaining in the suspense account shall be deposited to the general revenue fund.

(e) In each county in which voting machines or an electronic voting system has been adopted, the county commissioners court shall permit the county-owned voting machines or voting equipment to be used for the primary elections, including the conduct of absentee voting for the elections, at a charge for use at each election not exceeding \$16 per unit for voting machines adopted under Section 79 of the Texas Election Code, as amended (Article 7.14, Vernon's Texas Election Code), and not exceeding \$3 per unit for voting equipment adopted under Section 80 of the Texas Election Code, as amended (Article 7.15, Vernon's Texas Election Code). The maximum amount fixed in this Act includes the lease price for use of the unit, and also the charge for its preparation and maintenance if the county provides these services. The county is entitled to reimbursement for the cost of transporting the machines or equipment to and from the polling places if the county provides this service. Where voting is by an electronic voting system, the county may not charge for use of county-owned automatic tabulating equipment at the central counting station, but all actual expenditures incidental to operation of the central counting station in counting the ballots are payable out of the primary fund.

(f) All expenses of the county clerk in conducting absentee voting in the primary elections, including the employment of additional deputies where necessary, shall be paid by the county. A county is not entitled to reimbursement for any expenditure of county funds in connection with the conduct of absentee voting or any other services rendered by

the county clerk in the primary elections, except for voting machines and/or punchcard units used in conducting the absentee voting.

(g) The total combined compensation paid to the county chairman and the secretary of the county executive committee (where the committee has named a secretary) and to any office personnel employed to assist in the performance of the duties placed upon the chairman, the secretary, and the members of the county executive committee shall not exceed five percent of the amount actually spent in holding the primary elections for the year, exclusive of the compensation paid to these officers and employees.

(h) Charges for office expenses shall not be allowed for a period extending beyond the 10th day after the date of the last primary held by the party nor more than 30 days before the filing deadline.

(i) The secretary of state is authorized to promulgate rules in regard to the maximum number of election clerks who may be compensated for their services at a polling place, taking into account the number of registered voters in the election precinct, the number of votes cast in the precinct in the party's primary elections in 1972, the method of voting and other relevant factors. The secretary of state must allow compensation for the presiding judge, alternate judge, and at least one clerk for each precinct. The secretary of state may allow compensation for clerks employed in excess of the applicable limit set by the rules if he finds that employ-

ment of additional clerks was justified by special circumstances existing in the precinct. The secretary of state is authorized to promulgate any other reasonable rules which will minimize the costs of the primary elections. The secretary of state shall furnish a copy of all rules promulgated pursuant to this section to each county chairman at least 10 days before the election to which the rules apply.

(j) The county chairman is not required to file the financial report provided for in Subdivision 5 of Section 196 of the Texas Election Code, as amended (Article 13.18, Vernon's Texas Election Code), but he shall account for the primary fund in the manner provided in Section 2 of this Act.

(k) The secretary of state shall not approve any expenditure of state funds to any county organization that practices discrimination based on race, sex, age, creed, or national origin. The state attorney general shall be specifically responsible for the enforcement of this section.

(l) In the event a court of competent jurisdiction declares any portion of this section to be invalid, and by the 60th day before the filing deadline for a general primary election the judgment has become final or enforcement of the judgment has not been suspended, and the legislature has not corrected the invalidity (or in the event these circumstances arise subsequent to the 60th day before the filing deadline), the secretary of state shall promulgate a schedule of fees consistent with the court's judgment and the valid portions of this section; and that schedule shall be sub-

stituted for the statutory schedule until the legislature enacts a new schedule.

Sec. 2. STATE FINANCING

(a) Each county chairman of each political party in the state which is holding primary elections in 1974 shall submit to the secretary of state at least 30 days before the first primary election a sworn itemized estimate of the costs for conducting the first primary election in his county, together with a sworn statement of the filing fees and contributions received by the chairman, for such primary election to and including the date of such sworn statement. The secretary of state shall review the estimate and shall notify the chairman of any items which he has disallowed as unauthorized or excessive expenditures. Expenditures may be allowed only for those purposes which are properly payable out of the primary fund under existing law as established by the statutes and court decisions of this state. The secretary of state shall subtract from the approved estimate any amount of the fees and contributions received by the chairman remaining over and above legitimate expenses incurred for the conduct and financing of the primary elections for the year 1974, and shall certify to the comptroller of public accounts the net estimated amount which is payable out of the state funds, together with the secretary of state's calculation of three-fourths of that amount. The comptroller forthwith shall issue a warrant to the chairman for three-fourths of the certified amount.

(b) In each county in which a runoff primary is necessary, within 10 days after the first primary the county chairman shall submit to the secretary of state a sworn itemized estimate of the costs of the runoff primary. As in the case of the first primary, the secretary of state shall notify the chairman of items which he disallows, and shall certify to the comptroller the approved estimated amount which is payable out of state funds, together with the secretary of state's calculation of three-fourths of that amount; and the comptroller shall issue a warrant to the chairman for three-fourths of the certified amount.

(c) Within 20 days after the date of the runoff primary, the county chairman shall submit to the secretary of state a sworn itemized report of the actual costs, filing fees collected and contributions received for the primary election or elections (as the case may be) held by his party in his county. If the actual expenditure for an item exceeded the estimated amount, the chairman shall submit an explanation of the reason for the increased expenditure, and the secretary of state shall allow the increase if good cause is shown. The secretary of state shall certify to the comptroller the difference between the total amount payable out of state funds and the amount which has already been transmitted to the chairman, and the comptroller shall issue a warrant to the chairman in the amount certified. If the total amount of the fees and contributions and the payments from the state exceeds the actual expenditures incurred, the chairman shall refund the difference to the state, in the form of a check made payable to the secretary of state. The secretary of

state shall deposit the check in the state treasury to the credit of the appropriation from which payments to the county chairman were made by the secretary of state.

(d) Each county chairman shall deposit to the credit of the primary fund all warrants received by him under this section. Expenses incurred by or on behalf of the county executive committee for the conduct of the primary elections shall be paid from the primary fund, in the manner authorized by the committee.

(e) The county chairman is responsible for payment of claims for primary election expenses, and the state is not liable to any claimant for failure of the county chairman to pay a claim. No county chairman shall be personally liable, nor shall a county executive committee be liable, for any debts legally incurred in the implementation of this Act but unpaid because the appropriation provided by the legislature for the implementation of this Act was not sufficient to cover the actual expenditures made.

(f) The secretary of state shall prescribe and shall furnish to the county chairmen the forms which they are to use in submitting their statements and reports to him.

(g) Wherever the word "county chairman" is used in this Act, it shall apply to the county chairman or his successor in office, and such county chairman shall not be personally liable except for the misapplication of funds.

(h) In any case in which the secretary of state disallows an item of expenditure under Subsection (a) or (b) of this section, or refuses to allow an increase under Subsection (c) of this section, the county chairman may appeal to a district court of Travis County by filing a petition within 20 days after the date the notification is received from the secretary of state, and the district court shall allow such expenditures as are properly payable out of the primary fund under existing law. Any item not certified to the comptroller of public accounts for payment within 10 days after its submission to the secretary of state may be considered disallowed for this purpose. Judicial review shall be by trial de novo as are appeals from the justice court to the county court._____

Sec. 3. FUNDING

Funds for the administration of this Act shall be supplied from the general revenue fund by the General Appropriations Act. The secretary of state is authorized to expend funds appropriated in the General Appropriations Act for the administration of this Act for seasonal and part-time help, consumable supplies and materials and current and recurring operating expenses in an amount not to exceed \$30,000._____

Sec. 4. Paragraph (b), Section 12, Texas Election Code, as amended (Article 2.04, Vernon's Texas Election Code), is amended to read as follows:

“(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor

out of the parts of two or more justice precincts or commissioners precincts; and no election precinct shall be formed out of two or more congressional districts or state senatorial districts or state representative districts, nor out of the parts of two or more such districts. If in September of any year there exists any election precinct in the county which does not comply with the foregoing requirements, the commissioners court shall make the necessary changes before the first day of October, either at a regular meeting or at a special meeting called for that purpose; and the order shall be published as provided in Paragraph (a) of this section. Subject to the provisions of the first sentence of this paragraph, no election precinct shall have resident therein less than 100 nor more than 2000 voters as ascertained by the number of registered voters for the last preceding presidential general election year; provided, however, that in precincts in which voting machines or devices have been adopted for use in accordance with Section 79 or Section 80 of this Code, the maximum number of voters shall be 3000. There shall be a minimum of one election precinct wholly contained within each commissioners precinct."

Sec. 5. Section 180, Texas Election Code (Article 13.02, Vernon's Texas Election Code), is amended to read as follows:

"180. Nominated at primary

"On primary election day in 1974 and every two years thereafter, candidates for all state offices to be chosen, and

candidates for Congress and all District offices to be chosen by the vote of any district comprising more than one county, to be nominated by each organized political party that casts twenty percent (20%) or more of the votes for Governor at the last general election for that office, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party.

Sec. 6. Subdivision 1, Section 222, Texas Election Code, as amended (Article 13.45, Vernon's Texas Election Code), and the title of that section are amended to read as follows:

"222. Nominations by parties receiving less than 20 percent of vote for governor

"Subdivision 1. Parties receiving more than two percent of vote for governor. Beginning with the year 1976, any political party whose nominee for Governor in the last preceding gubernatorial general election received as many as two percent but not more than 20 percent of the total votes cast for Governor must nominate its candidates for the general election by conventions as provided in Sections 224 and 225 of this code. In the year 1974, a party whose candidate for governor received as many as two percent but less than 20 percent of the total votes cast for governor in the general election held in 1972 may make its nominations by primary elections or by conventions. The state executive committee of a party which has a choice as to the method of nomination

in 1974 shall decide, and by resolution declare, whether the party nominations will be made by conventions or by primary elections, and shall certify their decision to the Secretary of State not later than 12 months before the 1974 general election."

Sec. 7. Paragraph 2, Section 190, Texas Election Code, as amended (Article 13.12, Vernon's Texas Election Code), which relates to the application of a candidate for a place on a general primary election ballot, is amended to read as follows:

"2. The application shall be filed with the state chairman in the case of all statewide offices and all district offices which are filled by the choice of voters residing in more than one county. It shall be filed with the county chairman of the particular county in the case of county and precinct offices and district offices which are filled by the choice of voters residing in only one county or less than one county. Except as provided in Paragraph 2a of this section, the application shall be filed not later than 6 p.m. on the first Monday in February preceding such primary."

Sec. 8. Subsection (c), Section 187, Texas Election Code, as amended (Article 13.09, Vernon's Texas Election Code), is amended to read as follows:

"(c) The official ballot shall be printed in black ink upon white paper. The ballot shall be printed by the county committee in each county, which shall furnish to the

presiding judge of the general primary for each voting precinct at least as many of such official ballots as the county election board determines is necessary for each party based upon the votes cast in the area in the last preceding presidential general election."

Sec. 9. The importance of this legislation and the crowded condition of the calendar in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and the rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted._____

W. P. HOBBYPresident of the SenatePRICE DANIEL, JR.Speaker of the House

I hereby certify that S. B. No. 11 passed the senate on March 29, 1973, by the following vote: Yeas 25, Nays 5; May 28, 1973, senate concurred in house amendments by the following vote: Yeas 21, Nays 9. _____

CHARLES SCHNABELSecretary of the Senate

I hereby certify that S. B. No. 11 passed the house, with amendments, on May 26, 1973, by a non-record vote. _____

DOROTHY HALLMANChief Clerk of the HouseApproved:June 15, 1973Date

Filed in the office of the
Secretary of State

4:30 p. m. o'clock

Jun 16 1973

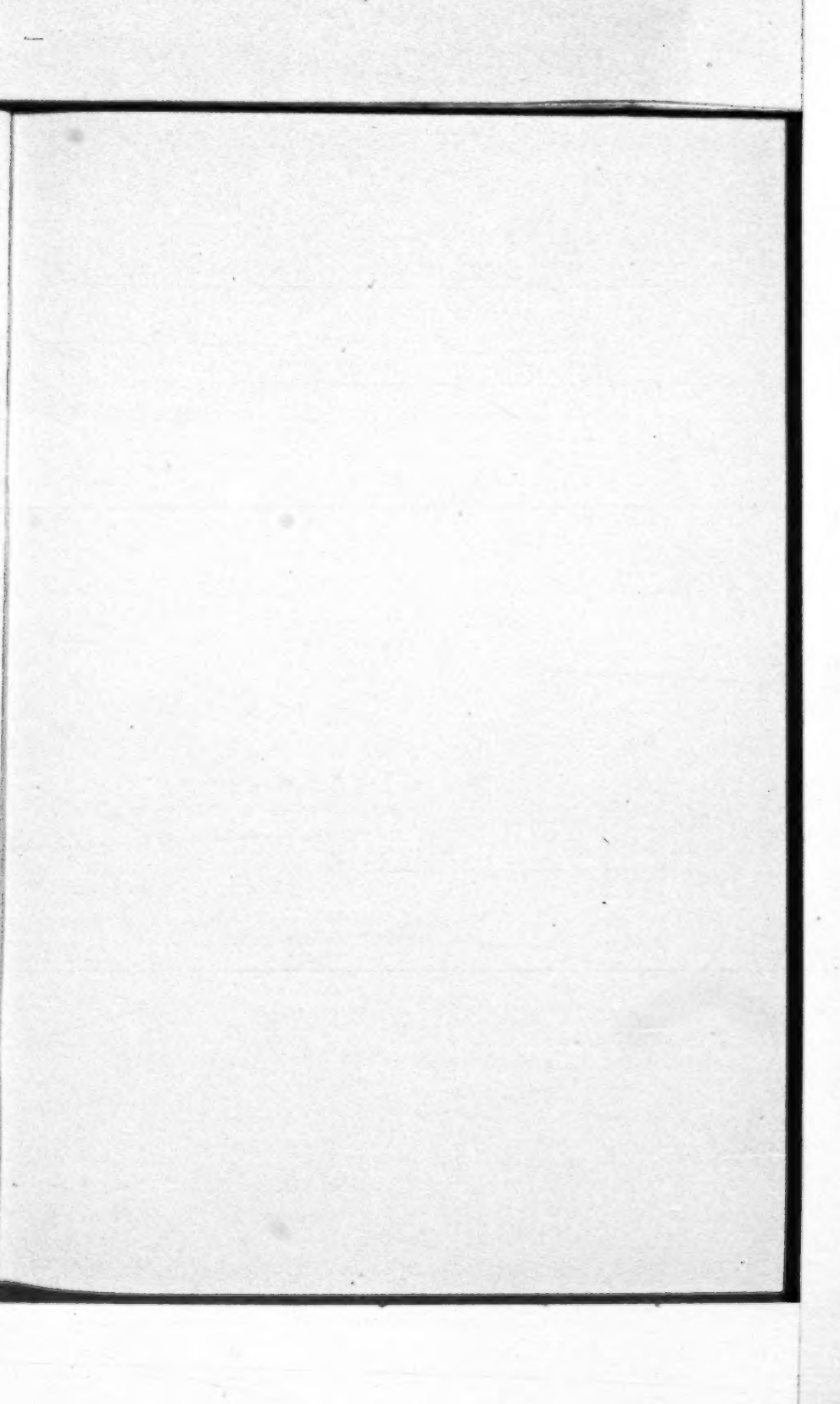
DOLPH BRISCOEGovernorMARK W. WHITE, JR.Secretary of State

CERTIFICATE OF SERVICE

I, GLORIA TANNER SVANAS, a member of the Bar of the Supreme Court of the United States and the attorney for the AMERICAN PARTY OF TEXAS, Appellant herein, hereby certify that on the 16th day of July, 1973, I have mailed three (3) copies of the foregoing Supplemental Appendix to Counsel at the following addresses: The Honorable John Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, Attorney for Appellee, State of Texas; Mr. Robert Hainsworth, 3710 Holman, Houston, Texas, 77004, Attorney for Appellant, Robert Hainsworth; Mr. Michael Anthony Maness, Seventh Floor, 711 Main Street, Houston, Texas, 77002, Attorney for Appellant, Texas New Party and Texas Socialist Workers Party; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas, 76700, attorney for Appellant, Laurel N. Dunn.

I certify that all parties required to be served, have been served.


GLORIA TANNER SVANAS



FEB 19 1974

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IN THE
Supreme Court of the United States
October Term, 1972

NO. 72-887
AMERICAN PARTY OF TEXAS, ET AL., *Appellants*
v.
MARK WHITE, *Appellee*

NO. 72-942
ROBERT HAINSWORTH, *Appellant*
v.
MARK WHITE, JR., SECRETARY OF STATE
OF TEXAS, *Appellee*

On Appeal From The United States District Court
For The Western District Of Texas

**MOTION FOR SPECIAL LEAVE
TO FILE SUPPLEMENTAL BRIEF
AND
SUPPLEMENTAL BRIEF OR MEMORANDUM
OF APPELLANT**

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OF TEXAS, Appellee

On Appeal From The United States District Court
For The Western District Of Texas

MOTION FOR SPECIAL LEAVE TO FILE
SUPPLEMENTAL BRIEF

To The Honorable Supreme Court:

Now Comes the Appellant and respectfully moves the Court under Rule 41 (6), and (5), For Special Leave to File a Supplemental Brief for the following reasons:

1. That Movant read in a local newspaper some time ago, that the Chief Justice of the Supreme Court would be a special guest of the Japanese government for one

week, but that the tour would not necessitate any interruption in the schedule of the Supreme Court because the Court would be taking one of the longest of several recesses scheduled for the 1973-1974 term, and that the Court would be in recess from Monday, January 21, 1974 to February 15, 1974.

That on account of the length of this recess, it has prompted to some extent this Motion For Special Leave To File a Supplemental Brief, although the case has been orally argued and submitted, which supplemental brief, it is hoped will be of some assistance to the Court in making a decision that is comprehensive in the above captioned case, *Hainsworth v. White*, No. 72-942.

2. That during the oral argument of this case, *Hainsworth v. White*, on November 5, 1973, in answer to a question of the Chief Justice, the counsel for the Appellant, unintentionally, may have, in his reply, given offense to the Chief Justice and Justices of the Court, and if so, I do respectfully apologize to the Chief Justice and to the Justices.

That a supplemental brief, if special leave is allowed to the Movant to file one, will permit a reply to the question asked by the Chief Justice to be given that is more complete, and may be of some assistance to the Court in the rendering of a decision that is full; because it is respectfully submitted that the answer to this question may lie near to the heart of this case.

3. That also, under Rule 41 (5), Movant requests special leave to include in his supplemental brief, matters that may be pertinent because of decisions handed down by the Supreme Court since oral argument of the above captioned case.

4. That if special leave is granted by the Court as requested above, it is further respectfully requested that the Movant be allowed until February 15, 1974, to file a supplemental brief.

Respectfully submitted,

ROBERT W. HAINSWORTH
Counsel for Appellant
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

IN THE
Supreme Court of the United States
October Term, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL., *Appellants*

v.

MARK WHITE, *Appellee*

NO. 72-942

ROBERT HAINSWORTH, *Appellant*

v.

**MARK WHITE, JR., SECRETARY OF STATE
OF TEXAS,** *Appellee*

**On Appeal From The United States District Court
For The Western District of Texas**

**SUPPLEMENTAL BRIEF OR MEMORANDUM
OF APPELLANT**

To The Honorable Supreme Court:

An Endeavor To Give A Better Answer.

During oral argument in the above case on November 5, 1973, the Honorable Chief Justice inquired as to

the Appellant having a friend who could help in obtaining signatures to his nominating petition? The Appellant replied—He is my friend who signs my application.

Endeavoring to give a better answer to the question, the following is submitted: From the Bible and in the Book of Proverbs, Chapter XVIII, and a portion of verse 24, reads: "A man that hath friends must shew himself friendly; * * *"

One who has a friend, can not take advantage of his friend. One who is trying to become an independent candidate can not allow his friend or a friend to give of his time and labor without pay.

And the cost of obtaining 500 notarized signatures to a nominating petition can come within the pale of *Bullock v. Carter*, 405 U.S. 134, a high filing fee case.

In addition to the above, since the filing of Appellant's Brief and since the oral argument, late cases, *Kusper v. Pontikes*, 94 S.Ct. 303, (1973) and *Communist Party of Indiana v. Whitcomb*, 94 S.Ct. 656, (1974) have been decided, and for this reason also this Supplemental Brief or Memorandum is submitted.

STATEMENT

Restrictions, and the right of a voter to cast a ballot for a different political party or candidate than the political party or candidate voted for in the prior primary election, or prior election.

ARGUMENT

That in *Kusper v. Pontikes*, supra, Mr. Justice Stewart delivering the opinion, the Court held that

freedom to associate with others for the common advancement of political beliefs and ideas is a basic constitutional freedom protected by the First and Fourteenth Amendments. And it would seem to follow that where a basic constitutional freedom is involved in the total electoral process that a State, and the State of Texas would have to show "A Compelling State Interest" in order to justify the rigid restrictions and impediments to access to the ballot by independent or non-partisan candidates.

Also in the *Kusper* case, the State of Illinois urged that the Illinois Statute served the purpose of preventing raiding, which is what the State of Texas urged in the set of cases now before the Court and the three Judge District Court upheld that view. But the Supreme Court decided in the *Kusper* case that the Illinois Statute locked the voter in to one party. This also appears to be true in the case of the Texas Anti-Raiding Statute in that independent candidates are not able to obtain signatures of qualified voters to their nominating petition until after the major party primaries are over.

STATEMENT

An appropriate measuring rod and guidelines.

ARGUMENT

In *Communist Party of Indiana v. Whitcomb*, Mr. Justice Brennan writing the opinion of the Court quoted from *Kusper v. Pontikes* "the right to associate with the political party of one's choice is an integral part of the basic constitutional freedom" and the states may not infringe upon basic constitutional freedoms in exercising

their powers of supervision over elections, and in setting qualifications for voters.

And in the minority opinion where there was concurrence in the result, but a difference of view as to the issues to be addressed, and citing a holding of the Supreme Court that a discriminatory preference for established parties under a State's Electoral System can be justified by only "a compelling State interest". And that the Indiana State Statute denied equal protection under the Fourteenth Amendment.

The right to associate with the political party of one's choice is an integral part of basic constitutional freedom. Also, by like reasoning, the right to associate with an independent candidate and to vote for an independent candidate is an integral part of this basic constitutional freedom.

That in the case of *Hainsworth v. White*, it is respectfully submitted to the Court that the case can be decided on the grounds set forth in the majority opinion of the above case, upholding the legal principles pertaining to State regulation of access to the ballot; or as well as on the grounds set forth in the minority opinion.

Also, on the basis of the grounds of the minority opinion, the equal Protection clause; would not the Republican Party in Texas, as well as the Democratic Party in Texas and also the minority parties, in order to have each of their respective candidates to attain initial ballot listing, be required to obtain some percentage of the votes cast for Governor in the preceding election in the area or territory or district for which the office is sought? That a nominating petition affords the lowest

common denominator which can be applied to all candidates for initial listing on the ballot, and equality of the laws would be afforded by varying the percentage requirements. And that the major parties could also add additional requirements as they so desired.

Too, this percentage-wise nominating petition requirement would aid in meeting the Texas Constitution requirement that the members of the State House of Representatives shall be chosen by the qualified electors.

CONCLUSION

For the reasons previously submitted, together with the reasons supplemented above, it is respectfully submitted to the Court that the judgment of the Lower Court be reversed, and that Art. 13.50 V.A.T.S. Texas Election Code be declared unconstitutional, and for such other and further relief that the Supreme Court may consider to be just and equity.

May GOD bless the Court, and long live the Court.

Respectfully submitted,

ROBERT W. HAINSWORTH
Counsel for Appellant
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

Syllabus

**AMERICAN PARTY OF TEXAS ET AL. v. WHITE,
SECRETARY OF STATE OF TEXAS****APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS**

No. 72-887. Argued November 5, 1973—Decided March 26, 1974*

Texas laws involved in this litigation provide four methods for nominating candidates in a general election: (1) candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election are nominated by primary election only, and the nominees of these parties automatically appear on the ballot; (2) candidates whose parties poll less than 200,000 votes, but more than 2% of the total vote cast for governor in that election are nominated by primary election or nominating conventions; (3) if the foregoing procedures do not apply, precinct conventions can, pursuant to Tex. Election Code, Art. 13.45 (2) (Supp. 1973), nominate candidates if the party is able, by notarized signatures, to evidence support by at least 1% of the total gubernatorial vote at the last preceding general election or (by a process to be completed within 55 days after the general May primary election) can produce sufficient supplemental petitions with notarized signatures (not including voters who have already participated in any other party's primary election or nominating process) to make up a combined total of the 1%; and (4) under Arts. 13.50 and 13.51, an independent candidate, regardless of the office sought, can qualify by filing within the time prescribed a petition signed by a certain percentage of voters for governor at the last preceding general election in a specified locality, the percentages varying with the offices sought (in this case 3% in a congressional district and 5% in a State Representative's district). In no event, are more than 500 signatures required of a candidate for any "district office." No voter, participating in any other political party nominating process or signing a nominating petition for the same office, may sign an independent's petition. Appellants, minority political parties and their candidates and supporters, and unaffiliated candi-

*Together with No. 72-942, *Hainsworth v. White, Secretary of State of Texas*, also on appeal from the same court.

dates, brought actions in the District Court seeking declaratory and injunctive relief against the enforcement of the Texas election laws, which they claimed infringed their associational rights under the First and Fourteenth Amendments and were invidiously discriminatory. They also challenged the practice of printing on absentee ballots only the names of the two major political parties and the State's failure to require printing minority party and independent candidates' names on absentee ballots and the exclusion of minority parties from the benefits of the McKool-Stroud Primary Financing Law of 1972, which provided for public financing from state revenues for primary elections of political parties casting 200,000 or more votes in the last preceding general election for governor. The District Court upheld the constitutionality of the State's election scheme. *Held:*

1. Article 13.45 (2), which does not freeze the status quo but affords minority parties a real and essentially equal opportunity for ballot qualification, does not contravene the First and Fourteenth Amendments and is in furtherance of a compelling state interest. *Storer v. Brown*, ante, p. 724. Pp. 776-788.

(a) The Equal Protection Clause does not forbid the requirement that small parties proceed by convention rather than primary election. The convention process has not been shown here to be invidiously more burdensome than the primary election, followed by a runoff election where necessary. Pp. 781-782.

(b) So long as the larger parties must demonstrate major voter support at the last election, it is not invidious to require smaller parties (which need make no such demonstration) to establish their position otherwise; and the 1% requirement (which two of the appellant parties were able to meet) imposes no insurmountable obstacle on a small party. Pp. 782-784.

(c) The bar against a person's signing a supplemental petition who has voted in a primary election or participated in a party convention is not unconstitutional, since he may choose to vote or to sign a nominating petition, but not to do both. Nor is it invidious to disqualify those who have voted in a primary from signing petitions for another party seeking ballot position for its candidates for the same offices, where that party had access to the entire electorate and an opportunity to commit voters on primary day. Cf. *Rosario v. Rockefeller*, 410 U. S. 752. Pp. 785-786.

(d) The 55-day period provides sufficient time for circulating

supplemental petitions and is not unduly burdensome, nor is the notarization requirement. Pp. 786-787.

2. The percentage provisions in Arts. 13.50 and 13.51 with the 500-signature feature are not unduly burdensome. Requiring independent candidates to evidence a "significant modicum of support" is not unconstitutional, and the record here is devoid of any proof to support the claims of appellant independent candidates (who relied solely on the minimal 500-vote-signature requirement) that these requirements were impermissibly onerous. Pp. 788-791.

3. The challenged McKool-Stroud provisions are not unconstitutional, since they were designed to compensate for primary election expenses to which the major parties alone are subject; and, as the District Court correctly found, "the convention and petition procedure available for small and new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries." Moreover, the State is not obliged to finance the efforts of every nascent political group seeking ballot placement, like appellant American Party, which failed to qualify for the general election ballot. Pp. 791-794.

4. The District Court erred in sustaining the exclusion of minority parties from the absentee ballot. No justification was offered by appellees for not giving absentee ballot placement to appellant Socialist Workers Party, which satisfied the statutory requirement for demonstrating the necessary community support needed to win general ballot position for its candidates. *Gosby v. Oser*, 409 U. S. 512; *O'Brien v. Skinner*, 414 U. S. 524. Pp. 794-795.

349 F. Supp. 1272, affirmed in part, vacated and remanded in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 795.

Gloria Tanner Svanas argued the cause for appellants in No. 72-887 and filed a brief for appellant American Party of Texas. *Michael Anthony Maness* filed a brief for appellants Texas New Party et al. in No. 72-887. *Robert W. Hainsworth*, appellant *pro se*, argued the cause and filed briefs in No. 72-942.

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John L. Hill, Attorney General of Texas, argued the cause for appellee in both cases. With him on the brief were *Larry F. York*, First Assistant Attorney General, and *J. C. Davis* and *Sam L. Jones, Jr.*, Assistant Attorneys General.

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases began when appellants, minority political parties and their candidates, qualified voters supporting the minority party candidates, and independent unaffiliated candidates, brought four separate actions in the United States District Court for the Western District of Texas against the Texas Secretary of State seeking declaratory and injunctive relief against the enforcement of various sections of the Texas Election Code.

The American Party of Texas sought ballot position at the general election in 1972 for a slate of candidates for various statewide and local officers, including governor and county commissioner.¹ The New Party of Texas wanted ballot recognition for its candidates for the general election for governor, Congress, state representative and county sheriff. The Socialist Workers Party made similar claims with respect to its candidates for governor, lieutenant governor and United States Senator.² Laurel Dunn, a nonpartisan candidate, at-

¹ Although the November 1972 election has been completed and this Court may not grant retrospective relief that would affect the outcome, this case is not moot. See *Rosario v. Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); see also *Storer v. Brown*, ante, at 737 n. 8.

² The District Court dismissed the complaints of the Texas Socialist Workers Party and another minority party, *La Raza Unida*, insofar as they challenged Art. 13.45 (2) (Supp. 1973) of the Election Code, because they lacked standing in view of their later certification by appellee for a place on the general ballot. *Raza Unida Party v. Bullock*, 349 F. Supp. 1272, 1276 (WD Tex. 1972). *La Raza*

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tempted to run for the United States House of Representatives from the Eleventh Congressional District. In his action, he represented himself and other named independent candidates for state and local offices. Finally, Robert Hainsworth sought election as state representative from District No. 86.

In these actions, it was alleged that, by excluding appellants from the general election ballot, various provisions of the Texas Election Code infringed their First and Fourteenth Amendment right to associate for the advancement of political beliefs and invidiously discriminated against new and minority political parties, as well as independent candidates. Appellants sought to enjoin the enforcement of the challenged provisions in the forthcoming November 1972 general election. They also challenged the failure of the Texas law to require printing minority party and independent candidates on absentee ballots and the exclusion of minority parties from the benefits of the McKool-Stroud Primary Law of 1972. The individual cases were consolidated, and a statutory three-judge District Court was convened. Following a trial, the District Court denied all relief after holding that, in their totality, the challenged provisions served a compelling state interest and did not suffocate the election process. *Raza Unida Party v. Bullock*, 349 F. Supp. 1272 (WD Tex. 1972). Two separate appeals

Unida has not appealed and the Socialist Workers Party, although an appellant here, does not appear to challenge the District Court's judgment that it had no standing to challenge Art. 13.45 (2). The District Court's dismissal, however, did not go beyond the attack on Art. 13.45 (2). It does not appear that ballot qualification would affect the standing of the Socialist Workers Party to challenge the Texas Primary Financing Law or the denial of absentee voting privileges to it. Both issues were presented in the Jurisdictional Statement filed by the party and appear as minor themes in the party's brief on the merits.

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were taken from the judgment, and we noted probable jurisdiction. 410 U.S. 965. We affirm the judgment of the District Court, except as it relates to the Socialist Workers Party and Texas' absentee ballot provisions.

I

The State of Texas has established a detailed statutory scheme for regulating the conduct of political parties as it relates to qualifying for participation in the electoral process. Under the laws challenged in this case, four methods are provided for nominating candidates to the ballot for the general election.³

Candidates of political parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only, and the nominees of these parties automatically appear on the ballot. Tex. Election Code, Art. 13.02 (1967).⁴ Texas holds a statewide primary for these

³ Texas also allows write-in votes in most elections, and they are counted. Tex. Election Code, Arts. 6.05, 6.06 (Supp. 1974).

⁴ "On primary election day in 1952 and every two (2) years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates for Congress and all district offices to be chosen by the vote of any district comprising more than one (1) county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more for governor at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party." Tex. Election Code, Art. 13.02 (1967).

We describe the law as it existed in 1972. While these cases were pending in this Court, the Texas Legislature amended Art. 13.02 of the Election Code to the extent that the mandatory primary election requirement, and the resulting automatic general election ballot position, are now triggered only when an organized political party casts 20% or more of the votes cast for governor at the last general election and not the previous 200,000 votes. At oral argument,

major parties on the first Saturday in May, with a runoff primary the first Saturday in June, should no candidate garner a majority. *Id.*, Art. 13.03 (1967).

Candidates of parties whose candidate polled less than 200,000, but more than 2%, of the total vote cast for governor in the last general election may be nominated and thereby qualify for the general election ballot by primary election or nominating conventions. Tex. Election Code, Art. 13.45 (1) (Supp. 1973).^{*} The nominating

counsel for appellants maintained that the Texas Legislature raised the automatic ballot qualification figure to 20% after the La Raza Unida Party gubernatorial candidate polled more than 2% of the total vote in the 1972 general election. Counsel further intimated that the law will be changed again should a minority party fulfill the new requirements. Tr. of Oral Arg. 7-8. Whatever their merits, we do not reach these contentions. The issues in this case revolve principally around the signature requirements for minority parties and independent candidates and are unaffected by the above amendment or by the amendment referred to in footnote 5, *infra*.

"Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in [Arts. 13.47 and 13.48]." Tex. Election Code, Art. 13.45 (1) (Supp. 1973).

During the pendency of these cases in this Court, the Texas Legislature, in the same Act amending Art. 13.02, amended Art. 13.45 (1). Starting in 1976, a political party whose nominee for governor in the last preceding general election received as many as 2% but less than 20% of the total votes cast for governor must nominate its candidates for the general election by conventions. For the 1974 elections, however, the amendment to Art. 13.45 (1) provides that those political parties receiving between 2 and 20% of the 1972 gubernatorial vote will continue to have a choice between primary elections and conventions.

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conventions are held sequentially, with the precinct convention on the same date as the statewide primaries for the major parties (the first Saturday in May), the county conventions on the following Saturday, and the state convention on the second Saturday in June. Tex. Election Code, Art. 13.47 (Supp. 1974); Art. 13.48 (1967).

Because their candidates polled less than 2% of the total gubernatorial vote in the preceding general election or they did not nominate a candidate for governor, the political parties in this litigation were required to pursue the third method for ballot qualification: precinct nominating conventions and if the required support was not evidenced at the conventions, the circulation of petitions for signatures. Tex. Election Code, Art. 13.45 (2) (Supp. 1973).^{*}

^{*}Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in [Arts. 13.47 and 13.48], but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with [Arts. 13.46a and 13.47] of this code, signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election.^{*} The address and registration certificate number of each signer shall be shown on the petition. No person

Finally, unaffiliated nonpartisan or independent candidates such as Dunn and Hainsworth could qualify by filing within a fixed period a written application or petition signed by a specified percentage of the vote cast for governor in the relevant electoral district in the last general election. Tex. Election Code, Arts. 13.50, 13.51 (1967).¹

who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: 'I know the contents of the foregoing petition, requesting that the names of the nominees of the _____ Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party.' The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by [Art. 13.03] of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$500.

"The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

"At the time the secretary of state makes his certifications to the county clerks as provided in [Art. 1.03] of this code, he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements." Tex. Election Code, Art. 13.45 (2) (Supp. 1973).

"The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent can-

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II

We consider first the appeals of the political parties and their supporters. Article 13.45 (2) (Supp. 1973) of the Texas Election Code, the validity of which is at issue

didates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

"If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

"If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the last preceding general election, and shall be addressed to the county judge.

"Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

"No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for

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here, requires that the political parties to which it applies nominate candidates through the process of precinct, county, and state conventions. The party must also evidence support by persons numbering at least 1% of the total vote cast for governor at the last preceding general election. In 1972, this number was approximately 22,000 electors. Two opportunities are offered to satisfy the 1% signature requirement. At the statutorily mandated

an office for which a nomination was made at either such primary election.

"The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

"Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office." Tex. Election Code, Art. 13.50 (1967).

"To every citizen who signs such application, there shall be administered the following oath, which shall be reduced to writing and attached to such application: 'I know the contents of the foregoing application; I have not participated in the general primary election or the runoff primary election of any party which has nominated, at either such election, a candidate for the office for which I desire _____ (here insert the name of the candidate) to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force and have signed the above application of my own free will.' One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered." Tex. Election Code, Art. 13.51 (1967).

precinct nominating conventions, held on the first Saturday in May and the same day as the major party primary, the party must prepare a list of all participants, who must be qualified voters, along with other pertinent information. The list is to be forwarded to the Secretary of State within 20 days after the convention. If it reveals the necessary support and if the party has satisfied the other statutory requirements imposed upon all political parties, the Secretary of State will certify that the party is entitled to be placed on the general election ballot.

Should the party not obtain the requisite 1% convention participation, supplemental petitions may be circulated for signature. When these are signed by a sufficient number of qualified voters in addition to the convention lists to make a combined total of the requisite 1%, the party qualifies for the ballot. Approximately 55 days after the general primary election in May are allotted for the supplementation process. A voter who has already participated in any other party's primary election or nominating process is ineligible to sign the petition. Furthermore, each signatory must be administered and sign an oath that he is a qualified voter and has not participated in any other party's nominating or qualification proceedings. The oath must also be notarized.

The American Party of Texas was able to secure only 2,732 signatures at its precinct conventions in May 1972. By the deadline for filing the precinct lists and supplemental petitions, the total had risen to 7,828, far short of the over 22,000 required signatures. Brief for American Party of Texas 2-3.* The Texas New Party ap-

* Prior to the convening of the three-judge court, the single-judge District Court had temporarily restrained appellee from refusing to accept and file supplemental nominating petitions obtained by the American Party of Texas between the statutory

parently made no effort to comply with the 1% requirement.⁹ Two relatively small parties, however, which were also plaintiffs in this litigation, La Raza Unida Party and the Socialist Workers Party, complied with the qualification provisions of Art. 13.45 (2) (Supp. 1973) and were placed on the general election ballot.

The party appellants challenge various aspects of the Texas ballot qualification system as they interact with each other: the 1% support requirement with its precinct conventions and petition apparatus, the preprimary ban on petition circulation, the disqualification from signing of those voters participating in another party's nominating process, the 55-day limitation on securing signatures, and the notarization requirement.¹⁰ They assert that

deadline for filing them, June 30, 1972, and September 1, 1972. During the additional court-ordered circulation period, the American Party of Texas garnered 17,678 additional signatures, bringing their total to over 25,000. Brief for American Party of Texas 5. In its final order, the three-judge District Court dissolved the restraining order and declared all signatures gathered during the extended period to be null and void. 349 F. Supp., at 1286. This Court denied a subsequent application for a temporary restraining order, 400 U. S. 803 (1972).

⁹ Tr. of Oral Arg. 24.

¹⁰ Appellants also challenged two aspects of the Texas Election Code unrelated to ballot qualification: exclusion from public financing for nomination and ballot qualification expenses and restrictions on the availability of absentee ballots. These provisions are discussed separately in Parts IV and V, *infra*.

The American Party and Texas New Party challenged in the District Court on equal protection and due process grounds the requirement of Art. 13.47a (1) (1967) that a person seeking nomination as a minority party candidate comply with Art. 13.12 and file a declaration to this effect approximately three months before the party primaries and conventions. The District Court upheld this provision, noting that it applied to *all* political parties. In this Court, only the Texas New Party has discussed this restriction. While appellant seems to be arguing that this requirement, along with all others imposed upon minority political parties, makes its ballot

these preconditions for access to the general election ballot are impermissible burdens on rights secured by the First and Fourteenth Amendments and violate the Equal Protection Clause of the Fourteenth Amendment as invidious discriminations against new or small political parties.

We have concluded that these claims are without merit. We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer v. Brown*, ante, at 729-733.¹¹ But we also agree with the District

qualification more burdensome, we are unable to distinguish this contention from the party's overall attack on the Texas statutory scheme. As such, it must fail for the reasons discussed in Part II of the opinion. Moreover, appellant readily concedes that "[t]his requirement is identical to that imposed upon prospective candidates for a major party nomination by Art. 13.12." Brief for Texas New Party 7. We do not understand appellant to be arguing that the State may impose no deadline for declaring one's candidacy. Nor do we read its brief on the merits as challenging the reasonableness of the three-month benchmark chosen by Texas. Under these circumstances, we affirm the judgment of the District Court on this point.

¹¹"The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v. Button*, 371 U.S. 415, 438 (1963)." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). See also *Kusper v. Pontikes*, 414 U.S. 51, 56-59 (1973).

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Court that the foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.

It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention. See *Storer v. Brown*, ante, at 733-736. Neither can we take seriously the suggestion made here that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election. We have considered the arguments presented, but we are wholly unpersuaded by the record before us that the convention process is invidiously more burdensome than the primary election, followed by a runoff election where necessary, particularly where the major party, in addition to the elections, must also hold its precinct, county, and state conventions to adopt and promulgate party platforms and to conduct other business.¹² If claiming an equal protection violation, the appellants' burden was to demonstrate in the first instance a discrimination against them of some substance. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson v. Skrupa*, 372 U. S. 726, 732 (1963) (footnote omitted). Appellants' burden is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election. The procedures are different, but

¹² See, e. g., Tex. Election Code, Arts. 13.33, 13.34, 13.35, 13.37, 13.38 (1967, Supp. 1973, Supp. 1974).

the Equal Protection Clause does not necessarily forbid the one in preference to the other.¹³

To obtain ballot position, the parties subject to Art. 13.45 (2) (Supp. 1973), as were these appellants, were also required to demonstrate support from electors equal in number to 1% of the vote for governor at the last election. Appellants apparently question whether they must file any list of supporters where the major parties are required to file none. But we think that the State's admittedly vital interests¹⁴ are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support. So long as the larger parties must demonstrate major support among the electorate at the

¹³ "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, *supra*." *Jenness v. Portson*, 403 U.S. 431, 441-442 (1971).

¹⁴ Appellants concede, as we think they must, that the objectives ostensibly sought by the State, *viz.*, preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling. Brief for Texas New Party 18-19. See, e.g., *Rosario v. Rockefeller*, 410 U.S., at 761; *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Rhodes*, 383 U.S., at 32. As we said only recently in *Jenness v. Portson*, *supra*, at 442:

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

See also *Asper v. Portson*, 414 U.S. 421 (1973).

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last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner. Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not "merely theoretical." *Jennness v. Fortson*, 403 U.S. 431, 439 (1971).

The District Court recognized that any fixed percentage requirement is necessarily arbitrary, but we agree with it that the required measure of support—1% of the vote for governor at the last election and in this instance 22,000 signatures—falls within the outer boundaries of support the State may require before according political parties ballot position.¹⁵ To demonstrate this degree of support does not appear either impossible or impractical, and we are unwilling to assume that the requirement imposes a substantially greater hardship on minority party access to the ballot.¹⁶ Two political parties which

¹⁵ The District Court balanced this lenient 1% petition requirement against what it thought was a somewhat burdensome requirement of precinct, county, and state conventions and concluded that, as a whole, the system was valid. Actually, save the precinct nominating conventions, the party nominating convention process is unrelated to ballot qualification and corresponds more to the democratic management of the political party's internal affairs.

¹⁶ As we have already indicated, the nominees of the two major parties are automatically placed on the general election ballot, but this is only because these parties have recently demonstrated substantial voter appeal. Texas has chosen this reasonable way to measure public support for the more established political parties. We do not understand appellants to argue that the Democratic and Republican Parties in Texas must also be required to circulate petitions and garner the requisite 1% showing. We further doubt that appellants would care to be forced to conduct a primary

were plaintiffs in this very litigation qualified for the ballot under Art. 13.45 (2) (Supp. 1973) in the 1972 election. It is not, therefore, immediately obvious that the article, on its face or as it operates in practice, imposes insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed.

The aspiring party is free to campaign before the primary and to compete with the major parties for voter support on primary election and precinct convention day. Any voter, however registered, may attend the new party's precinct convention and be counted toward the necessary 1% level. Unlike the independent candidate under Texas law, see *infra*, at 788, and his California counterpart, see *Storer v. Brown*, *ante*, at 738, a party qualifying under Art. 13.45 (2) (Supp. 1973) need not wait until the primary to crystallize its support among the voters. It is entitled to compete before the primary election and to count noses at its convention on primary day, just as the major parties and their candidates count their primary votes. Furthermore, should they fall short of the magic figure, they have another chance—they may make up the shortage and win ballot position by circulating petitions for signature for a period of 55 days beginning after the primary and ending 120 days prior to the general election.

election in every precinct in each of Texas' 254 counties. Cf. *Jenness v. Fortson*, *supra*, at 441. Moreover, the major parties, like their smaller or newer counterparts, must satisfy the same statutory qualifications as to declaration of candidacy, certifications of nominating process results, and the like. Texas has provided alternative routes to the ballot—statewide primaries and precinct conventions—and it is problematical at best which is more onerous in fact. It is sufficient to note that the system does not create or promote a substantial imbalance in the relative difficulty of each group to qualify for the ballot.

It is true that at this juncture the pool of possible supporters is severely reduced, for anyone voting in the just-completed primary is no longer qualified to sign the petition requesting that the petitioning party and its nominees for public office be listed on the ballot. Appellants attack this restriction, but, as such, it is nothing more than a prohibition against any elector casting more than one vote in the process of nominating candidates for a particular office. Electors may vote in only one party primary; and it is not apparent to us why the new or smaller party seeking voter support should be entitled to get signatures of those who have already voted in another nominating primary and have already demonstrated their preference for other candidates for the same office the petitioning party seeks to fill. We think the three-judge District Court in *Jackson v. Ogilvie*, 325 F. Supp. 864, 867 (ND Ill.), aff'd, 403 U. S. 925 (1971), aptly characterized the situation in upholding a state election law provision preventing a voter from both voting in the primary and signing an independent election petition:

"Thus, the state's scheme attempts to ensure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. He cannot have it both ways."

"The parties have not brought to our attention any decision holding that as a constitutional matter, a State is obligated to allow a voter to vote in a party primary and sign a nominating petition. It is true that under the Georgia system in *Jennsen v. Fortson*, *supra*, the State had apparently decided that its legitimate goals would not be compromised by allowing voters to sign a petition even though they have signed others and participated in a party primary. Nothing in that decision, however, can be read to impose upon the States the affirmative duty to allow voters to move freely from one to the other method of nominating candidates for the

We have previously held that to protect the integrity of party primary elections, States may establish waiting periods before voters themselves may be permitted to change their registration and participate in another party's primary. *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Cf. *Kusper v. Pontikes*, 414 U.S. 51 (1973). Likewise, it seems to us that the State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process. At least where, as here, the political parties had access to the entire electorate and an opportunity to commit voters on primary day, we see nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices.

Neither do we consider that the 55 days is an unduly short time for circulating supplemental petitions. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers—only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. A petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required

same public office. This reading becomes all the more evident in light of the fact that *Jackson v. Ogilvie*, 325 F. Supp. 864 (ND Ill. 1971), was affirmed on the same day that *Jenness* was decided, 403 U.S. 925. Indeed, the federal court decisions with which we are familiar agree with *Jackson v. Ogilvie* and reflect the views we adopt here. See, e.g., *Moore v. Board of Elections for the District of Columbia*, 319 F. Supp. 437 (DC 1970); *Wood v. Putterman*, 316 F. Supp. 646 (Md.), aff'd, 400 U.S. 859 (1970); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (SDNY 1970), aff'd, 400 U.S. 806.

the States to do the impossible. *Dunn v. Blumstein*, 405 U. S. 330, 360 (1972). Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those imposed by Texas are too onerous, especially where two of the original party plaintiffs themselves satisfied these requirements.¹²

Finally, there remains another facet to the signature requirement. Article 13.45 (2) (Supp. 1973) provides that all signatures evidencing support for the party, whether originating at the precinct conventions or with supplemental petitions circulated after primary day, must be notarized. The parties object to this requirement, but make little or no effort to demonstrate its impracticability or that it is unusually burdensome. The District Court determined that it was not, indicating that one of the plaintiff political parties had conceded as much. The District Court also found no alternative if the State was to be able to enforce its laws to prevent voters from crossing over or from voting twice for the same office. On the record before us, we are in no position to disagree.

In sum, Texas "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness v. Portson*, 403 U. S., at 439. It

¹² The 55-day period for petition circulation terminates 120 days before the general election. We agree with the District Court that some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges. We also believe that in view of the overall statutory scheme and particularly in light of the "second chance" Texas affords smaller political parties to qualify by petition, the 120-day pre-election filing deadline is neither unreasonable nor unduly burdensome.

affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.

III

Appellants Dunn and Hainsworth challenged Arts. 13.50 and 13.51, which govern the eligibility of non-partisan or independent candidates for general election ballot position. Regardless of the office sought, an independent candidate must file, within 30 days after the second or runoff primary election, a written petition signed by a specified number of qualified voters. The signatures required vary with the office sought. Dunn was required to obtain signatures equaling 3% of the 1970 vote for governor in the congressional district in which he desired to run; Hainsworth, a candidate for the State House of Representatives, needed 5% of the same vote in his locality. Article 13.50, however, states that in no event would candidates for any "district office," as Dunn and Hainsworth were,¹⁹ be required to file more than 500 signatures. The law also provides that a voter may not sign more than one petition for the same office and is barred from signing any petitions if he voted at either primary election of any party at which a nomination was made for that office. Each voter signing an independent candidate's petition must also subscribe to a notarized oath declaring his nonparticipation in any political party's nominating process. Art. 13.51.

Dunn and Hainsworth contend that the First and Fourteenth Amendments including the Equal Protection Clause forbid the State from imposing unduly burdensome conditions on their opportunity to appear on the general election ballot. The principle is unexception-

¹⁹ Tex. Election Code, Art. 14.01.

able, cf. *Storer v. Brown*, ante, at 738, 739, 740, 746; but requiring independent candidates to evidence a "significant modicum of support"²⁰ is not unconstitutional. Demanding signatures equal in number to 3 or 5% of the vote in the last election is not invalid on its face, see *Jennness v. Fortson*, supra; and with a 500-signature limit in any event, the argument that the statute is unduly burdensome approaches the frivolous.

It is true that those who have voted in the party primaries are ineligible to sign an independent candidate's petition. In theory at least, the consequence of this restriction is that the pool of eligible signers of an independent candidate's petition, calculated by subtracting from all eligible voters in the 1972 primaries all those who voted in the primary and then adding new registrations since the closing of the registration books, could be reduced nearly to zero or to so few qualified electors that securing even 500 of them would be an impractical undertaking. But this likelihood seems remote, to say the least, particularly when it will be very likely that a substantial percentage, perhaps 25%, of the total registered voters will not turn out for the primary and will thus be eligible to sign petitions,²¹ along with all new registrants

²⁰ *Jennness v. Fortson*, 403 U. S., at 442; see supra, at 782.

²¹ This 25% approximation may actually be a conservative projection. Voting statistics compiled by the Office of Secretary of State indicate that 2,306,910 votes were cast for Governor in the first 1972 Texas primaries of both parties and 2,036,770 in the runoff primary elections. As of January 31, 1972, the last date before the primaries on which aggregate statewide statistics are available, 3,872,462 voters had registered in Texas. Thus, without accounting for any increased registration by the time of the primaries, registered voter turnout ranged from approximately 60% to 53%, respectively. It is, of course, conceivable that some voters participating in the runoff primaries had not voted in the first primary, thereby raising to some figure higher than 60% those voters who were disqualified under Texas law from signing the nominating peti-

since the closing of the registration books prior to the primary. In any event, nothing in the record before us indicates what the total vote in the last election was in the districts at issue here, nothing showing what the primary vote would be or was in 1972, and nothing suggesting what the size of the pool of eligible signers might be. As the District Court noted, the independent candidates presented "absolutely no factual basis in support of their claims" that Art. 13.50 imposed unduly burdensome requirements. 349 F. Supp., at 1284. Dunn and Hainsworth relied solely on the minimal 500-signature requirement. This was simply a failure of proof, and

tions of independent candidates. We are nevertheless unwilling to assume based on the evidence before us that this would be such a high number of voters that independent candidates would be left with an insignificant pool of eligible voters to sign their petitions.

Comparative voting statistics on primary election participation in other States also suggest that the 25% estimate is modest. In California, for example, official figures reveal the following percentage of total registered voters at all party primaries for the past seven biennial elections:

1960	62.80%
1962	63.53%
1964	71.94%
1966	64.67%
1968	72.21%
1970	62.23%
1972	70.95%

California Secretary of State, Statement of Vote, Consolidated Primary Election, June 6, 1972, p. 3.

The 1972 Democratic Party presidential primaries in Florida and Massachusetts witnessed voter turnout of approximately 59% and 56%, respectively. 30 Congressional Quarterly 481, 862, 1655 (1972). The realistic prospect of a postprimary pool of much higher than 25% is even greater in light of the fact that Texas has traditionally trailed behind national voter participation averages by a sizable margin. C. McCleskey, *The Government and Politics of Texas* 38 (4th ed. 1972).

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for that reason we must affirm the District Court's judgment with respect to these appellants.²²

IV

In response to this Court's decision in *Bullock v. Carter*, 405 U. S. 134 (1972), invalidating the Texas filing-fee requirements, the state legislature enacted as a temporary measure the McKool-Stroud Primary Financing Law of 1972. Tex. Election Code, Art. 13.08c-1.²³ The statute

²²The independent candidates also challenged the notary provision of Art. 13.51. Nothing that we have been shown, however, convinces us that the notarial requirement for independent candidates is more suspect or burdensome than that imposed upon the political parties. See *supra*, at 787.

²³Since it was a temporary measure, this primary financing legislation has expired, and it has been replaced by new legislation, the Primary Conduct and Financing Law of 1974. Tex. Election Code, Art. 13.08c-2 (Supp. 1974). This scheme provides for a schedule of candidate filing fees for access to the general primary election ballot. The filing fee is waived should the primary candidate file a nominating petition signed by a designated number of voters. Those filing fees paid to the county chairman of a political party holding a primary election are used to pay the party's primary expenses. Any remaining costs are defrayed by the State in accordance with a voucher system substantially identical to that provided in the McKool-Stroud Primary Financing Law of 1972 challenged by appellants. The new legislation is also comparable to its predecessor insofar as only those political parties required to conduct primary elections, which under recent amendments to the Texas Election Code are only those parties polling 20% or more of the vote cast for governor in the last general election, see n. 4, *supra*, are eligible for state funding.

The recent amendments to the 1972 financing law have not mooted this controversy. If appellants were correct that they had been unconstitutionally deprived of public financing for their 1972 qualification and nomination expenses, they might be able to compel the State to reimburse them. Under these circumstances and in view of the special nature of election challenges in general and this short-term funding measure in particular, we proceed to evaluate appellants' claims on the merits.

generally provided for public financing from state revenues for primary elections of only those political parties casting 200,000 or more votes for governor in the last preceding general election. On its face, therefore, the law precluded any payment of state funds to minor political parties to reimburse them for the costs incurred in conducting their nominating and ballot qualification processes.²⁴ In all, over \$3,000,000 was appropriated by the state legislature to the two major political parties to defray their expenses in connection with the 1972 primary elections. Brief for American Party of Texas 19-20, n. 41.

The District Court rejected all constitutional challenges to the law, noting that the statute was designed to compensate for primary election expenses and that "[t]he convention and petition procedure available for small or new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries," 349 F. Supp., at 1285. The District Court also emphasized that in response to the State's argument in *Bullock v. Carter* that state financing of primary elections would necessitate defining those political parties entitled to financial aid and would invite new charges of discrimination, this Court pointed out that under Texas law only those parties whose gubernatorial candidates received more than 200,000 votes were required to conduct primaries and said "[w]e are not persuaded that Texas would be faced with an impossible task in distinguishing

²⁴ The American Party has alleged that by virtue of the State's compulsory nominating and qualification procedures, it was forced to incur extraordinary costs, including the printing of 12,000 signature sheets, payment of at least 50¢ as a statutory notary fee for over 22,000 signatures, and expenditures for distributing, collecting, and filing petitions.

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between political parties for the purpose of financing primaries." 405 U. S., at 147.²⁵

We affirm the judgment of the District Court. All political parties who desire ballot position, including the major parties, must hold precinct, county, and state conventions. See, e. g., Tex. Election Code, Arts. 13.33, 13.34, 13.35, 13.38, 13.45, 13.45a, 13.47 (1967, Supp. 1973, Supp. 1974). The State reimburses political parties for none of the expenses in carrying out these procedures. New parties and those with less than 2% of the vote in the last election are permitted to nominate their candidates for office in the course of their convention proceedings. The major parties may not do so and must conduct separate primary elections. As we understand it, it is the expense of these primaries that the State defrays in whole or in part. As far as the record before us shows, none of these reimbursed primary expenses are incurred by minority parties not required to hold primaries. They must undergo expense, to be sure, in holding their conventions and accumulating the necessary signatures to

²⁵ "Appellants strenuously urge that apportioning the cost among the candidates is the only feasible means for financing the primaries. They argue that if the State must finance the primaries, it will have to determine which political bodies are 'parties' so as to be entitled to state sponsorship for their nominating process, and that this will result in new claims of discrimination. Appellants seem to overlook the fact that a similar distinction is presently embodied in Texas law since only those political parties whose gubernatorial candidate received 200,000 or more votes in the last preceding general election are required to conduct primary elections. Moreover, the Court has recently upheld the validity of a state law distinguishing between political parties on the basis of success in prior elections. *Jenness v. Fortson*, *supra*. We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries." 405 U. S., at 147 (footnote omitted).

qualify for the ballot, but we are not persuaded that the State's refusal to reimburse for these expenses is any discrimination at all against the smaller parties and if it is, that it is also a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment. We are unconvinced, at least based upon the facts presently available, that this financing law is an "exclusionary mechanism" which "tends to deny some voters the opportunity to vote for a candidate of their choosing" or that it has "a real and appreciable impact on the exercise of the franchise." *Bullock v. Carter*, 405 U. S., at 144.

We should also point out that the appellant American Party mounts the major challenge to the primary financing law. The party, however, failed to qualify for the general election ballot; and we cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group seeking to organize itself and unsuccessfully attempting to win a place on the general election ballot.

V

Under Art. 5.05 (Supp. 1974) otherwise qualified voters in Texas may vote absentee in a primary or general election by personal appearance at the county clerk's office or by mail. It is the State's practice, however, to print on the absentee ballot only the names of the two major, established political parties, the Democrats and the Republicans. *Raza Unida Party v. Bullock*, 349 F. Supp., at 1283-1284.

The District Court sustained the exclusion of minority parties from the absentee ballot, relying on the presumption of constitutionality of state laws, *McDonald v. Board of Election Comm'rs*, 394 U. S. 802 (1969), and the rationality of not incurring the expense of printing absentee ballots for parties without substantial voter

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support. The Socialist Workers Party, however, satisfied the statutory requirement for demonstrating the necessary community support needed to win general ballot position for its candidates, and with respect to this appellant, the unavailability of the absentee ballot is obviously discriminatory. The State offered no justification for the difference in treatment in the District Court, did not brief the issue here, and had little to say in oral argument to justify the discrimination.

We have twice since *McDonald v. Board of Election Comm'rs* dealt with alleged discriminations in the availability of the absentee ballot, *Goosby v. Osser*, 409 U. S. 512 (1973); *O'Brien v. Skinner*, 414 U. S. 524 (1974). From the latter case, it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause. Plainly, the District Court in this case employed an erroneous standard in judging the Texas absentee voting law as it was applied in this case. We therefore vacate the judgment of the District Court in this respect and remand the Socialist Workers Party case to the District Court for further consideration in light of *Goosby v. Osser* and *O'Brien v. Skinner*. In all other respects the judgment of the District Court is affirmed.

So ordered.

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with the Court on the absentee ballot aspect of these cases, I dissent on the main issue. These cases involve appeals from the dismissal of consolidated class actions seeking declaratory and injunctive relief against provisions of the Texas Election Code relating to

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minority parties and independent candidates. The District Court noted that:

"While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process [*Williams v. Rhodes*, 393 U. S. 23 (1968)], and those on the other end which do not [*Jenness v. Fortson*, 403 U. S. 431 (1971)], this case presents a new combination which falls squarely in the middle." *Raza Unida Party v. Bullock*, 349 F. Supp. 1272, 1275-1276 (WD Tex. 1972).

The hurdles facing minority parties such as the American Party of Texas in seeking to place nominees on the ballot are set out and compared with those of *Jenness v. Fortson*, 403 U. S. 431, in my opinion dissenting from the denial of a temporary restraining order in *American Party of Texas v. Bullock*, 409 U. S. 803.¹ I there noted that:

"We said in *Jenness v. Fortson*, *supra*, at 438, 'Georgia's election laws, unlike Ohio's, do not operate to freeze the status quo.' Texas, though not as severe as Ohio, works in that direction. It therefore seems to me, at least *prima facie*, to impose an

¹ As I there noted, minority parties whose gubernatorial candidate in the last election polled more than 2% of the total votes cast but less than 200,000 were allowed to select candidates through either primaries or nominating conventions. Tex. Election Code, Art. 13.45 (1) (Supp. 1972). The law has since been changed so that a minority party which fielded a gubernatorial candidate who polled more than 2% of the vote in the last election may not select candidates through primaries but must nominate through conventions unless the gubernatorial candidate polled more than 20% of the vote. Texas S. B. No. 11, 63d Legislature, Regular Session, §6 (1973), quoted in Supplemental Appendix to Brief for Appellants American Party of Texas 14-15.

invidious discrimination on the unorthodox political group.

"Perhaps full argument would dispel these doubts. But they are so strong that I would grant the requested stay . . ." *Id.*, at 806.

Oral argument has failed to dispel the doubts. For the reasons stated in *American Party of Texas v. Bullock*, *supra*, I believe that the totality of the requirements imposed upon minority parties works an invidious and unconstitutional discrimination.

An analysis of the requirements imposed on independent candidates leads me to the same conclusion.² Under

²The requirements for independent candidates are set forth in Tex. Election Code, Art. 13.50 (1967):

"The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

"If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

"If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the

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the procedures reviewed in *Jenness*, independent candidates seeking a ballot position had six months to secure the signatures of 5% of the eligible electorate for the office in question. The percentage required in Texas ranges, according to the office, from 1% of the last statewide gubernatorial vote to 5% of the last local gubernatorial vote, and in any case no more than 500 signatures are required; the candidate, however, has only 30 days in which to gather them. In *Jenness* a voter could

last preceding general election, and shall be addressed to the county judge.

"Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

"No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election.

"The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

"Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 227; as amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 104."

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sign a candidate's petition even though he had already signed or would sign others. Here no voter may sign the application of more than one candidate. In *Jenness* a voter who signed the petition of an independent was free thereafter to participate in a party primary and a voter who previously voted in a party primary was fully eligible to sign a petition. Here independents are not even allowed to seek signatures until after the major party primaries and no voter who has participated in a party primary is allowed to sign an independent candidate's application. In *Jenness* no signature on a nominating petition had to be notarized; but that is not the case here.

In *Jenness* we were able to say that Georgia "has insulated not a single potential voter from the appeal of new political voices within its borders." 403 U. S., at 442. In Texas, however, the independent, like the minority party, must "draw [his] support from the ranks of those who [are] either unwilling or unable to vote in the primaries of the established parties." *American Party of Texas v. Bullock*, 409 U. S., at 806. As with minority parties, I do not believe that Texas may constitutionally have independent candidates to "be content with the left-overs to get on the ballot." *Ibid.*

END OF CASE